VALUATION OF RAILROAD LANDS

HEARINGS

BEFORE THE

COMMITTEE ON INTERSTATE COMMERCE UNITED STATES SENATE

SIXTY-SEVENTH CONGRESS

FIRST SESSION

ON

S. 539

A BILL TO AMEND THE FIRST AND SECOND PARAGRAPHS OF SECTION 19a OF THE INTERSTATE COMMERCE ACT

JUNE 10 AND 11, 1921

Printed for the use of the Committee on Interstate Commerce

WASHINGTON
GOVERNMENT PRINTING OFFICE
1921

COMMITTEE ON INTERSTATE COMMERCE.

ALBERT B. CUMMINS, Iowa, *Chairman.*

CHARLES E. TOWNSEND, Michigan.
ROBERT M. LA FOLLETTE, Wisconsin.
MILES POINDEXTER, Washington.
GEORGE P. McLEAN, Connecticut.
JAMES E. WATSON, Indiana.
FRANK B. KELLOGG, Minnesota.
BERT M. FERNALD, Maine.
JOSEPH S. FRELINGHUYSEN, New Jersey.
DAVIS ELKINS, West Virginia.
ELLISON D. SMITH, South Carolina.
ATLEE POMERENE, Ohio.
HENRY L. MYERS, Montana.
OSCAR W. UNDERWOOD, Alabama.
JOSIAH O. WOLCOTT, Delaware.
A. OWSLEY STANLEY, Kentucky.

JOHN BRIAN, *Clerk.*

VALUATION OF RAILROAD LANDS.

FRIDAY, JUNE 10, 1921.

UNITED STATES SENATE,
COMMITTEE ON INTERSTATE COMMERCE,
Washington, D. C.

The committee met, pursuant to call, at 10 o'clock a. m., Hon. Albert B. Cummins (chairman) presiding.

Present: Senators Cummins (chairman), McLean, Kellogg, Myers, Underwood, and Stanley.

Present also: Mr. S. W. Moore, representing the Kansas City Southern Railway Co.; Mr. W. G. Brantley, representing the Presidents' Conference Committee on Federal Valuation of the Railroads in the United States; Mr. John E. Benton, general solicitor, National Association of Railway Utilities Commissioners; and Hon. P. J. Farrell, chief counsel, Interstate Commerce Commission.

Thereupon the committee proceeded to the further consideration of S. 539, a bill to amend an act entitled "An act to regulate commerce," approved February 4, 1887, as amended.

The CHAIRMAN. I think we may proceed with the hearing. Judge Brantley, you may proceed. It is the understanding—in fact, I have been, in effect, directed by the committee to give the opponents of the bill one hour and those who are in favor of it one hour. You may divide the time any way you see fit.

STATEMENT OF MR. W. G. BRANTLEY, WASHINGTON, D. C., REPRESENTING PRESIDENTS' CONFERENCE COMMITTEE ON FEDERAL VALUATION OF RAILROADS OF THE UNITED STATES—Resumed.

Mr. BRANTLEY. Mr. Chairman, I desire to use 30 minutes of my hour and to give the other 30 minutes to Judge Moore. We appear to-day jointly on behalf of the carriers in opposition to the pending bill.

The paragraph of the act entitled "second," is as follows:

> Such investigation and report shall state in detail and separately from improvements the original cost of all lands, rights of way, and terminals owned or used for the purpose of a common carrier, and ascertained as of the time of dedication to public use, and the present value of the same, and separately the original and present cost of condemnation and damages or of purchase in excess of such original cost or present value.

The pending bill proposes, among other things to eliminate from this paragraph this language—

> And separately the original and present cost of condemnation and damages or of purchase in excess of such original cost or present value.

And the main purpose of the bill is to eliminate that language from the law.

It is argued in support of the bill that this language requires the commission to ascertain an amount as cost of condemnation or damages in excess of the present value of carrier lands, and it is charged that the carriers, in opposing the passage of this bill are seeking to have allowed to them in the valuation of their properties as the value of their lands a greater amount than the present value of their lands.

It is said in support of the bill that if it becomes a law the valuation act will still require the commission to ascertain and report the present value of carrier lands, and that the carriers are not entitled to anything more than the present value of their lands.

I purpose, Mr. Chairman, to demonstrate briefly that all these several contentions and arguments are fallacious. The carriers do not ask and never have asked that they be allowed anything more than the present value of their lands on the date of their valuation. The language in paragraph second of the act is rather confusing. The more it is studied the more the necessity will be disclosed for a construction of it and a definition of what it is that this paragraph second as it now reads requires the commission to do.

Senator UNDERWOOD. You are speaking now of the law or of the bill?

Mr. BRANTLEY. The law as it now reads.

The commission comparatively early found a construction of this paragraph second as it now reads which, I think, is sound, which has been accepted by the carriers, and which gives a meaning clear and explicit as to its requirements. You will find—and I have printed it in the hearings—the commission's own statement of its methods of enforcing this law, which is attached to their report on the final valuation of the Texas Midland Railroad. That method has been followed by them consistently in every valuation they have made, both tentative and final, and in every land report, preliminary and final, that they have prepared.

Now, in that statement of method they come to the language in paragraph second which requires them to report the present value of carrier lands, and they state that their method of doing this is to ascertain the number of acres of carrier land, to determine the market value of similar land adjoining or in the immediate vicinity per acre, and to apply that price to the number of acres. Nothing, they say, is included for the expenses of acquisition nor for interest during construction.

Again, they say that what is done is to ascertain the number of acres of carrier land, to determine the market value of similar land adjoining or in the immediate vicinity per acre, and to apply that price to the number of acres. Thus they dispose of the meaning of the requirement in paragraph second that they find the present value of carrier lands, and their method is nothing more than computing a railroad right of way into acres and applying to the total number of acres the acreage value of adjacent land.

Then they say, pursuing a further consideration of paragraph 2 of the act:

> The right of way of a carrier is frequently donated, but in so far as the carrier must acquire this by purchase or condemnation the cost generally exceeds the acreage value of the lands taken. This is partly due to the peculiar

shape of the piece acquired and partly to other causes. This excess cost to the carrier is a thing of importance in the actual production of its railroad, and the carrier claims that it ought to be given weight in the estimate of reproduction. Evidently this was the fact for which Congress intended to inquire. What did it cost and what would it now cost the carrier to procure its right of way and other operative lands in excess of the market value of such lands by the acre?

If this construction is correct, the commission is required to report as to the operative lands of a carrier the following facts:

1. Original cost.
2. Present value—

Which they hold is acreage value—

3. Cost of procuring right of way in excess of acreage value at the time of dedication to public use.
4. Cost of procuring right of way at the present time in excess of present acreage value—

Not in excess of the value of the strip, but simply in excess of the acreage value of the adjacent lands.

Senator KELLOGG. That is what the commission held?

Mr. BRANTLEY. That is the commission's construction of the language of paragraph 2.

It follows that if Congress now strikes from the act the requirement for the commission to ascertain the cost of condemnation, which the commission has construed as merely a requirement to find the excess cost above acreage value, to acquire the land you will leave the law, under the commission's construction of it, as simply requiring them to find the acreage value of carrier lands.

I do not think it takes any argument to demonstrate that the value of a 100-foot strip of land can not be determined by reference to the acreage value of the land composing it, or to the acreage value of the lands that lie adjacent to it. I do not think it requires any argument to demonstrate that what the commission reports as the present value of carrier lands is not the value of such lands. It is not the value under any known case or recognized rule of law. It certainly is not the value under the rule laid down in the Backus case, that value is determined by reference to the productiveness of the use of the property. It is not the value determined by the present cost of acquisition, because the 100-foot strip can not be acquired at the acreage value of the lands taken, and the commission so says.

So you will have, if this bill becomes a law, an acceptance of the passage of the bill by the commission as the approval of Congress that the present value of carrier lands is nothing but the acreage value of the adjacent lands, and the result will be that this error, which undoubtedly it will be, will never be corrected until some day when the courts will have the opportunity to review the work of the commission and set the valuations aside.

The only practical result that the passage of this bill therefore will accomplish will be delay in the completion of the valuation work, due to the fact that when the valuations are completed they must come back to the commission, under our construction of the law, to be further considered, and in order that the value of the lands may be ascertained and included in the valuation. Thus there will be more delay in the enforcement of the transportation act.

If that is not the result accomplished, the only other result that could likely follow would be for the commission to revise its definition

of "present value," and their definition that I have read to you they have followed consistently for eight years.

Senator STANLEY. I came in late, and did not hear your definition of "present value."

Mr. BRANTLEY. I gave the commission's own definition. Their method of determining the present value called for by the act is to ascertain the number of acres of carrier land, to determine the market value of similar adjoining land per acre, and to apply that price to the number of acres.

Either the commission will proceed under its definition of present value or it must go back and go over all its land work, finding a new definition of present value and writing in new figures in all of the reports it has heretofore made.

Senator KELLOGG. Do you know of any elements which a court or the commission should take into consideration in the final determination of present value of the railroads which are not provided for in this act as it stands now?

Mr. BRANTLEY. The act, Senator, as it now reads—this committee when it reported the present law stated they would so frame it that it would show the exact cost of reconstructing the property in all its parts at existing prices.

Senator KELLOGG. I know that, but have there been developed before the commission by the arguments of the commission or the railroads any elements that the railroads now think have been omitted from this law?

Mr. BRANTLEY. You mean in reference to land?

Senator KELLOGG. In reference to the value of all the property—well, lands especially we are dealing with now.

Mr. BRANTLEY. Dealing with lands, the carriers know, of course, that the commission has actually to date, under the decision of the Supreme Court in the Kansas City Southern mandamus case, ascertained the excess cost above acreage value, and we say it is essential for them——

Senator KELLOGG. That is not the question. As the law now stands, if the commission goes ahead and finds the facts required by the law, is there anything omitted that they will have to go back and find over again?

Mr. BRANTLEY. Nothing that I know of. The law as it stands today is complete, requiring the ascertainment of every fact necessary to valuation.

Senator KELLOGG. The law does not impose on the commission any duty to give effect to any particular element so named? It leaves that entirely to the commission or the courts?

Mr. BRANTLEY. Entirely to the commission.

Senator KELLOGG. Or the courts.

Mr. BRANTLEY. Or the courts. Under the present law and under the present methods of the commission—because, as you gentlemen know, since the Supreme Court in the mandamus case of the Kansas City Southern required them to ascertain this excess cost above the acreage value, they are ascertaining it—what they do is to report, first, the original cost of the land, if it can be ascertained. Second, they report the acreage value of the land, which they call present value. Third, they report the excess cost of acquiring the land above its acreage value.

These are separately reported and constitute the several elements to be considered in he determination of the real value of the land on the date of valuation, and this bill is a proposal to eliminate from consideration one of these real elements of the value of the land, to wit, the cost to acquire it on the date of its valuation.

I submit it is infinitely better procedure for the commission to go on as it is now doing, ascertaining the original cost, the acreage value, and the excess above acreage value, even though when it determines the figure of value that it will report it excludes from consideration the excess cost of acquisition—which it actually is doing. I do not suppose anyone will claim that in the figures of final value heretofore reported the commission has given any consideration to this excess cost, although they have reported it. I submit it is infinitely better procedure for them to make the valuation in that way, because when the courts come to review what they have done the courts will have before them all the facts, including this excess cost of acquisition, and if the courts hold that that is an element which ought to be considered in the determination of value the courts can complete the final valuation, because all the facts will be before the court; whereas if the commission does not report this excess cost of acquisition the courts must of necessity send the valuation back in order that the lands may be properly valued.

Senator KELLOGG. That is, if the court held it was material?

Mr. BRANTLEY. Yes. We submit, in the next place, that as a matter of law there is no way to determine the present value of a 100-foot strip of right of way, or whatever its width may be, other than by a consideration of the cost of condemning it if it was not owned by the railroad. In other words, the cost of reproduction, the cost of replacement, or the cost of acquisition of that land, under all the decisions of the court, is an essential and necessary element for consideration in the determination of its value. That is the rule laid down in Smyth *v.* Ames and in many, many cases in the Supreme Court with reference to the value of railroad and other public-utility properties.

The only argument or contention that I have ever heard against the enforcement of this provision of the law as it now reads, to wit, the present cost of condemnation, is the theory that the Supreme Court in the Minnesota Rate cases held that it was impossible to ascertain the resent cost of condemnation, and that if it is ascertained it would be so speculative an amount that it could not be considered in the determination of the value of the lands. In fact, Director Prouty, in a letter that is in the record of hearings before the House committee, although saying that this excess cost of acquisition could be ascertained with accuracy, that he was ascertaining it; and that there was no trouble about ascertaining it, said:

> Under the decision of the Supreme Court in the Minnesota Rate cases we can not use the figure after we get it, and therefore I think this bill ought to pass and we ought not to be required to ascertain something that under the law we can not make any use of if we do ascertain it.

Of course I appreciate that the decision of the Supreme Court in the Minnesota Rate cases has been the subject of much debate. Director Prouty is on record as saying he had never seen two lawyers who would agree as to what the court really decided in that case. But,

in my own mind, the complete answer to the construction given to this decision by my friends Mr. Farrell and Mr. Benton is in the fact that the courts are every day ascertaining the cost of condemnation of lands, and it seems to me it is a most remarkable thing to hold that the Supreme Court in the Minnesota Rate cases had decided it was impossible to ascertain it. For this commission, a body of trained experts, to say that they are incompetent and unable to determine the cost of condemnation of lands, a thing that petit juries are doing all over this country every day, is a conclusion that I am utterly unable to follow.

The Supreme Court has repeatedly held in condemnation cases that the mere value of the land taken is not always the amount of compensation that must be paid, but that the damages to the remainder of the property is something that the owner is entitled to compensation for.

Another thing about the Minnesota Rate cases. Whatever else the court may have decided in that case, it is perfectly clear that the court did decide this, and everybody must agree on that, that the valuations of the railroads there involved were set aside upon the sole ground that the value of the carrier lands had not been properly determined.

The importance of the land as an essential part of the property and the necessity of determining its value in accordance with legal principles is thus clearly established by these cases. What the court really condemned in the Minnesota Rate cases was the speculative manner in which the cost-of-reproduction method was attempted to be applied. I heard my friend, Mr. Benton, tell your committee the other day that Judge Sanborn, in the Minnesota Rate cases, had decided to apply a multiple or percentage to the acreage value of the land in order to ascertain its cost of reproduction, and that the Supreme Court had condemned that method. That interpretation of what Judge Sanborn did is not supported by the Supreme Court's construction of what he did. The Supreme Court found that what was claimed in that case as market value was increased from something like $2,000,000 to nearly $5,000,000 to arrive at a value for railway purposes, which value for railway purposes the carrier claimed was the value of its lands.

Now, the Supreme Court did not know how the market value was arrived at, because they say that Mr. Cooper, the witness for the carrier, testified that the figure he claimed as the market value was his estimate of what it would cost the company to purchase the lands, exclusive of improvements that might be on them, severance and consequential damages, and expenses incident to acquisition. The court said that the normal value—that is, the acreage value of the lands in sales between private parties—does not satisfactorily appear. In other words, there was not a syllable of evidence as to what the lands would have brought in sales between private parties. There was no evidence as to their acreage value. There was a claim on the part of the witnesses for the carrier that what they called a market value was their estimate and their guess of what they would have to pay for these lands, and then, having made that guess, they increased the figure from two to three times in order to cover what they called the railway value of the lands, and then they said that this railway value was the value of their lands.

The first thing the Supreme Court did was to disagree with them about there being a railway value. The court disagreed with them in their claim of market value. They said, "What the normal value or market value may be is not shown."

Senator UNDERWOOD. Let me ask you a question right there, Judge Brantley. As I understand it, it has been contended here that the necessity for this legislation is because the statute prevents the commission from forming the conclusion that you have just stated, that they should not fix the railroad value, but the real value of the land. Is this commission under its procedure in condemning these lands assessing the railroad value as it is claimed Judge Sanborn did, or is it fixing the real value as would be done in ordinary condemnation proceedings?

Mr. BRANTLEY. Just as in ordinary condemnation proceedings. All elements of railway value and special value are ignored. All the difficulties and troubles pointed out in the Minnesota Rate cases grew out of an attempt by witnesses, who furnished no evidence of normal value, no evidence of acreage value, to make an estimate of what they would have to pay for the lands, and the court points out the difficulties necessarily involved in making that kind of estimate. But those difficulties are out of the way of the commission, because the commission has found the normal value. The commission has found the acreage value and reported it. What this law requires them to do as it now stands is merely to report, in addition, the excess above the acreage value that would have to be paid for the strips. So when they are through they will have the original cost wherever they have ascertained it; they will have the acreage value of the lands, the ascertainment of which disposes of every trouble found or suggested in the Minnesota Rate cases; they will have, third, the excess cost above acreage value that would measure the cost to acquire the strips. With all those facts—which include, as you will see, the present and original cost of construction—they will determine under the rule laid down in Smyth *v.* Ames what the value of the land is. All speculation is eliminated, and the procedure is in accordance with established rules of law.

In the Minnesota Rate cases the court said that there was "no evidence before the court from which an amount which would be properly allowable in condemnation proceedings could be ascertained." In the report that the commission is making the amount that would be allowable in condemnation proceedings is found and reported as a fact——

Senator STANLEY. Whether the land was ever actually condemned or not?

Mr. BRANTLEY. Whether the land was ever actually condemned or not. It is just an estimate of the cost of reproduction of the land, just as there is an estimate made of the cost of reproduction of all other physical property.

That the court did not condemn the use of estimates of costs of condemnation, when based upon proper assumptions, is repeatedly made manifest in the opinion in the Minnesota Rate cases. In one paragraph the court speaks of the impossibility of assuming, in making a "judicial finding of what it would cost to acquire the property," that the company would be compelled to pay more than its fair

market value, thus recognizing that there could be a judicial finding of what the cost would be, which is the thing done in every condemnation case.

The carriers in the Minnesota Rate cases proceeded on the assumption, according to the Supreme Court, that they did not possess the power of eminent domain, and that they would have to pay more than the fair market value of the land. The commission is not proceeding upon any such assumption. It is assuming that the carriers have the power of eminent domain and that the carrier would not have to pay any more than the fair market value of the land, and all the carriers are asking is the fair market value of the strip as contradistinguished from the fair market value of the acre. And that is all in the world that is involved in this bill.

In the Minnesota Rate cases the court quoted with approval and with emphasis the rule in Smyth *v.* Ames, which requires, in order to determine the value of any public-utility property, that there be considered, among other things, "the present as compared with the original cost of construction." The court spoke of the cost-of-reproduction method, and it was dealing with land, because you gentlemen know the opinion does not touch any question except land and depreciation, and that so far as cost of reproduction is discussed it deals only with land, and they say that method "is of service in ascertaining the present value of the plant when it is reasonably applied and when the cost of reproducing the property may be ascertained with a proper degree of certainty."

I believe my time is about to expire. I have put into the record heretofore, gentlemen, a complete statement, I think, of how the commission arrives at this excess cost of acquisition. It is done with remarkable accuracy. Judge Prouty says it is accurate. The carriers accept it as reasonably accurate. Of course, it is an estimate, but it is no more of an estimate than any other figure of cost of reproduction reported by the commission.

I thank you, gentlemen.

The CHAIRMAN. Judge Moore, we will hear you now.

Mr. MOORE. Shall I proceed now, or shall I close?

The CHAIRMAN. It does not make any difference. There is nothing formal about the hearing, and I had not thought about the order in which you were to proceed. Have you any preference?

Mr. MOORE. It does not make the slightest difference to me.

Senator KELLOGG. Then I suggest that you go ahead.

STATEMENT OF MR. S. W. MOORE, REPRESENTING THE KANSAS CITY SOUTHERN RAILWAY CO., NEW YORK CITY—Resumed.

Senator UNDERWOOD. Judge Moore, I do not want to interrupt your argument, but let me ask a question that is in my mind. The original condemnation of this land was proposed without any legislative fact behind it looking to the taking of the land. When the Cummins bill was passed we had fixed the returns to the railroads, their earning capacity, on the value of the property, expecting ultimately to rest on this condemnation proceeding. The problem in my mind is this, that that puts it on the same basis as a real condemnation, because when we fix the return on the value it is on the same basis as if we condemned the land.

Now, what I want to know is, whether the present law provides an ascertainment of value that will be recognized in the courts as covering all the necessary elements in ascertaining value, without direction from the Congress as to how it shall be done, which I think is prohibited under the law, and whether the proposed amendment reaches the same point and provides all the necessary questions to be ascertained that would be considered in ascertaining the value for condemnations. I do not know whether I make myself clear or not.

Mr. MOORE. If I understand you correctly, your question is this: The transportation act requires the commission to ascertain a value which may be used for purposes of consolidation——

Senator KELLOGG. Or rate making.

Mr. MOORE. Or rate making, or for purposes of recapture of excess earnings, or the issuance of securities.

My conception of that law is that that requires the real value of the property to be ascertained—that is to say, the value protected by the Constitution of the United States—and therefore that value must be ascertained in the manner and by the rules that the courts have laid down.

The courts have held that a number of pieces of evidence are competent, material, and relevant on the subject of value. They said that in the case of Smyth *v.* Ames, and it is quoted with approval in the Minnesota Rate cases—the latest expression of the Supreme Court on the subject.

Now, what are the relevant and material elements to be considered by the court or by the commission in the exercise of its judicial powers in the determination of value? One element is the cost of reproducing the property, or, to use the exact language of the court in Smyth *v.* Ames, the present as compared with the original cost of construction.

One part of the present cost of construction is the cost of acquiring the right of way. Other elements are the cost of grading, the cost of rails in place, the cost of bridges, etc., but one item of the cost of reproducing a railroad is the cost of acquiring the lands as of valuation date. No one denies that that is one competent, material, and relevant piece of evidence upon the issue of value. The present law as it stands provides that the commission shall collect and assemble every piece of evidence which the court has said has a bearing upon the subject of value. And that is as it should be.

Now, the purpose of this bill, if it passes, will be to direct the commission that one piece of evidence which is competent, material, and relevant upon the issue of value, to wit, the present cost of acquisition of lands, shall not be ascertained, and, inferentially, shall not be considered by the commission in ascertaining the value under the transportation act. In brief, that is the case, that the judicial power of the Government has decided that the cost of acquisition or the cost of reproduction of lands is material evidence upon the subject of value. Congress has told the commission to assemble all the proper evidence and from it to deduce the value of each railroad in the country. It is proposed by this bill that the legislative branch of the Government shall direct this commission in the exercise of its judicial functions to disregard one element of

value which the courts of the land have held to be material and relevant. That was done once before——

Senator KELLOGG. The law does not require the commission to give any particular effect to this finding of the cost of acquiring this property at the present time, but it lumps it in with all the other items which they shall find and simply leaves the commission to find the present value of the property.

Mr. MOORE. Yes.

Senator KELLOGG. Now, suppose the court should hereafter find that that was an element that must be considered by the commission and given such weight as the commission should deem proper. Would the commission have to go back and make all these findings over again, or the court take testimony on it in order to arrive at the proper conclusion?

Mr. MOORE. Of course the court could not take testimony upon it.

Senator KELLOGG. No.

Mr. MOORE. The only way would be to send it back to the commission, and then the commission would have to go away back to the beginning and remake all of their land schedules, and, of course, remake all of their valuations.

Will you pardon me if I refer to a very similar situation which arose recently in England? There there was a law passed in 1909 for the valuation of the real property in England and Scotland, for the purpose of taxing the unearned increment, and the requirement was that the value of the naked land should be ascertained and then revalued from time to time, and the increase in value of that naked land would be taxed, and in that way the unearned increment would be reached.

Proceedings were had under that law for some 10 years and efforts were made by assessors to compile the data required by the law. Finally, at the end of 10 years it was given up as a hopeless task and the law was repealed. The reason it was a hopeless task was that they became involved in many refinements. Some years after the schedule had been made up some court would render a decision which would make it necessary to go back and remake the schedules from the beginning.

Just to illustrate that I would like to read one paragraph from the report, which was printed a short time ago. This is significant, because it shows the very difficulties that will happen if this bill passes, in my judgment. In this particular English case the assessors in making out their estimates of value back in 1909 treated the grass as being divested; that is to say, in taking this artificial conception of the value of the land with the improvements removed they assumed the grass was not there. Then some years afterwards the court decided that that was wrong and they had to go years back and remake their assessments. Here is what it said:

> The commissioners of inland revenue, up to the decision of Smyth v. Commissioners of Inland Revenue, valued land on which grass was growing on the assumption that it was not divested. Under the above decision it was decided that grass was to be assumed to be divested. The result is that the valuation of grass land made before the decision was not in accordance with the act. To revalue them would appear to involve a reinspection of the land, which would necessarily be a costly matter.

That, to my mind, illustrates precisely the question which you ask. If this bill passes and you direct the Interstate Commerce Commis-

sion to exclude any competent, relevant, and material matter, and the commission does so and renders its valuation in accordance therewith, and thereafter some court holds just as was held here, that the cost of acquisition should have been considered by the commission, it means that the matter will have to be sent back to the commission, and they must go back to the beginning and start their schedules showing the cost of acquisition. Then they set it down for a hearing, and then there is reargument, and the valuation proceedings have to be gone over.

It seems to me beyond any question that the wise thing and the safe thing to do, from the standpoint of everyone, is to let the valuation act stand as it is. The work of the ascertainment of the cost of acquisition of lands is proceeding and is nearing completion. It is away ahead of the tentative valuations which have been made by the commission. Judge Prouty says, in a letter which is in the record, that the ascertainment of the cost of acquisition will in nowise delay the valuation proceedings. So it seems to me this should be the procedure, to let the commission complete its ascertainment of cost of acquisition of lands. Then they have the evidence before them. It will be our privilege to argue that the cost of acquisition of lands should be incorporated into and become a part of the value of the railroad property. It will be Mr. Benton's privilege to argue that the cost of acquisition of lands should be ignored. We do not know what the commission will decide; it is for it to pass upon in the exercise of its judicial functions. But is it not the better plan and the safer plan for all concerned—the carriers, the commission, the shippers, and everyone—to let this valuation proceed in the safest manner, in the manner calculated to produce the least confusion and to result in a valuation which the courts will sustain?

The CHAIRMAN. Judge Moore, I do not want to take a moment of your time, but I wish you would state in how many cases already decided the commission has found the original cost of the lands?

Mr. MOORE. In how many cases?

The CHAIRMAN. In how many cases already decided has the original cost of the lands been reported?

Mr. MOORE. Well, there have only been four cases decided, as I recall—that is, where a final figure of value has been assigned—but I can only speak for one of them, that is the Kansas City Southern. In that case the commission has found the original cost of the lands. The lands were acquired for that road about 1890, and the commission has compiled the considerations contained in the original deeds. Many of the considerations were, of course, nominal in the deed, but were really in money. While for that reason the record of the cost of the land is somewhat fragmentary, the commission has made a compilation of the original cost as shown by the deeds, and that is fairly complete. As to the other lines, I can not say.

The CHAIRMAN. You all agree that that is not the original cost of the lands, do you not?

Mr. MOORE. Well, that is the consideration named in the deeds. I do not think it is accurate; it certainly is not accurate in all respects.

The CHAIRMAN. The Bureau of Valuation has reported tentatively some 30 or 40 railroads, has it not?

Mr. MOORE. Yes, sir.

The CHAIRMAN. In how many of those cases has the Bureau of Valuation attempted to report the original cost of the lands?

Mr. MOORE. Well, I think they have attempted to do it in all cases. As to how accurate it is, I am not able to say. I know in a general way that the condition that obtains in the Kansas City Southern is similar to the condition on other roads. That is to say, that the deed records of the railway companies are not entirely accurate, because many times it appears that the consideration is a dollar, when, as a matter of fact, the consideration was in excess of that. So the original cost records are not entirely accurate, but within a certain degree of error I think they are reasonably accurate.

Senator UNDERWOOD. As I understand you, Judge Moore, no matter what your position may be in the final court of decision you are not contending here that we should make the law include the original cost of these lands as the basis on which the court should decide it, but we should allow it to be included in ascertaining these facts, so that it may be before the court at the time of its decision?

Mr. MOORE. That is precisely my position.

The CHAIRMAN. My question was intended simply to develop the fact that the commission has found it in many cases—I think in nearly all—impossible to ascertain the original cost of the land, and the act requires the commission to do that just as imperatively as it requires the commission to ascertain the excess cost of present acquisition of lands.

Senator KELLOGG. And this bill pending here does not repeal that part of the act at all?

The CHAIRMAN. It does not, and I was wondering why the railroads did not bring suit in mandamus to compel the commission to find the original cost.

Mr. MOORE. In our particular case, as I say, they have made a compilation showing the consideration given in every deed to right of way that the company has, and we have no complaint on that score. We do say this, however, that on the Kansas City Southern the so-called present value, as found by the commission in June, 1914, is less than the original cost of the lands in 1890 by some $184,000.

Mr. BRANTLEY. May I suggest, Senator Cummins, that the Minnesota Rate cases says, among other things, that it is the property and not the original cost of it which is protected under the Constitution.

The CHAIRMAN. You referred to Smyth *v.* Ames and also other decisions, which do name the original cost as one of the elements which must be considered in ascertaining the present value of the lands. I am simply calling attention to the fact that that is one element that, under the present reports of the commission, will need to be considered.

Mr. MOORE. Let me give you a concrete illustration which I think is typical for the purpose of showing the relation between what the commission calls its present value and the actual value of the property. In the case of the Kansas City Terminal Railway Co., which owns a railroad that cost some $50,000,000, at Kansas City it acquired in 1910 a large number of tracts of land by condemnation—and I speak of them because I brought the condemnation suits and conducted them.

Senator KELLOGG. Do you mean the Belt Line?

Mr. MOORE. The Kansas City Terminal Railway Co., the Belt Line. Now, in these particular condemnations brought in 1910 the cost of the land—that is, the actual cost of acquiring the land—was $2,400,000 in round numbers. That cost is a court record. There is no question about it.

Now, these very same lands that cost $2,400,000 have been valued by the commission, that is to say, the present value, so called, has been assigned to those lands of $1,400,000. There is a difference in that particular case of $1,000,000 between the commission's so-called present value and what the lands actually cost in condemnation in court proceedings.

Now, our contention is that it is not right or not just for Congress to tell the commission that they shall disregard the actual cost of those lands—$2,400,000—and only consider the so-called present value, which is $1,400,000. Our contention is that both figures should go before the commission, and the counsel shall be permitted to argue and draw every inference that seems to them legitimate as to what value should be attached to that property, but it is for the commission to say what value shall be attached to the lands which actually cost two and one-half million dollars, but which have an acreage value of one and one-half million dollars.

And I may say that that situation in the case of the Kansas City Terminal is not exceptional. The same situation will be found in every case of recent construction or recent acquisition of real property, because where real estate has been purchased for right of way within the last 10 years the actual cost of it in condemnation or in purchase will be very considerably in excess of the acreage value. And everyone who has had experience with condemnation proceedings realizes that.

Now, it is said in the report of the subcommittee of this committee having charge of the bill:

> It may be that the commission is not employing sound principles in ascertaining what the statutes call the present value of lands. If it is not, the mistake will be unfortunate, but may hereafter be corrected.

Now, I feel compelled to dissent from the statement that the mistake there may be hereafter corrected, for this reason, that if this bill passes it then becomes a reenactment of the valuation act with the provision concerning the cost of acquisition of lands eliminated. But the commission has construed the provision of the valuation act concerning present value, has attached a peculiar construction to it, what we think is an erroneous construction, but it has attached that construction to that language, and Congress has been advised of that construction.

Now, if, with that knowledge; that is, with the knowledge of the construction which the Interstate Commerce Commission has placed upon that language "present value," you reenact that statute, it results, as a legal proposition, that the construction which the commission has placed upon that expression "present value" is to be deemed as read into the statute, and by the passage of this bill you in substance say to the commisison:

> You have been ascertaining present value, which is in reality acreage value, in a certain manner. Now, by the reenactment of this statute, we instruct you to proceed and continue in that same way.

And when it comes before the court the court will say that by the reenactment of the statute, leaving in that part which has been construed by the commission, the construction placed upon it by the commission is to be deemed to be read into the act and to be a part of it.

That precise question was decided by the Supreme Court of the United States in 200 U. S., where it says:

> The prohibitions of the act to regulate commerce as to rebates, favoritism, and discrimination having been construed by the Interstate Commerce Commission, charged with its execution, to be inapplicable to the freight rates for coal charges by interstate carriers empowered to mine and market coal by their charters or by legislation existing at the time of the adoption of the act, this construction, which has long obtained in practical execution and has been impliedly sanctioned by the reenactment of the statute without alteration in the particulars construed, must be treated as read into the statute.

So that if you pass this act as a matter of law the construction which the Interstate Commerce Commission has placed upon this expression "present value" will be read into the statute, and it will amount to a command to them to continue to ascertain present value as they have ascertained it, and to use that conception, and that only, in the determination of the value, and to absolutely disregard the condemnation cost or the present cost of acquisition of lands. In other words, when we get before the commission to argue for the value of our property, the law gives us the right to have before the commission the cost of reproducing lands. And the commission can very properly point to this act, this reenactment, as an approval of their method of procedure, and that will be the answer to our question.

Now, it is stated also in the report that the result of the work, when done, will be valueless and mischievous. I must respectfully dissent from that statement. Now, it seems to me that it can only be mischievous on the assumption that the commission charged with the duty of considering this evidence and placing a value upon railway properties will make an improper use of it. Surely Congress does not mean to say that. If the commission considers it and gives it such consideration and weight as it merits, then surely the result can not be mischievous.

And with reference to the statement that it will be valueless, it seems to me that when that attitude is taken it can only mean one thing, and that is that the decision of the Supreme Court in Smythe *v.* Ames, which holds that this element of value was proper evidence, was incorrect; that that case was incorrectly decided. But so long as the law stands as it is that cost of reproduction is a proper matter for consideration by the commission, or by the courts, so long as this class of evidence has some value, and ought not to be characterized as valueless.

Now, it seems to me that the most serious conclusion stated in this report is that the ascertainment of the present cost of acquisition of land is impossible; that it involves an impossible theory of valuation. If there was anything settled in the Kansas City Southern mandamus case it was that that contention was erroneous. It was contended in that case, as will appear from the briefs that are quoted in the opinion, as it appears from what the commission itself says, which is quoted in the opinion, that almost the entire contention of the com-

mission was that it was impossible to ascertain present cost of condemnation and damages, that it involved impossible hypotheses and inadmissible assumptions. And all of that is recited in the opinion of the court, as follows:

> It is true that the commission held that its nonaction was caused by the fact that the command of the statue involved a consideration by it of matters "beyond the possibility of rational determination," and called for "inadmissible assumptions," and the indulging in "impossible hypotheses" as to subjects "incapable of rational ascertainment," and that such conclusions were the necessary consequence of the Minnesota Rate cases.

Now, that contention was apparently before the court, and was understood by the court, and was not overlooked, and it disposes of it in this way by saying that the reasoning of the commission and its conclusions were absolutely erroneous. It says:

> We are of opinion, however, that, considering the face of the statute and the reasoning of the commission, it results that the conclusion of the commission was erroneous.

I can read in that language nothing else than a clear and concise statement by the Supreme Court of the United States that as a matter of law the ascertainment of the present cost of condemnation and damages is a practical thing and can be done in a practical way, and that it is of value in the determination of the railroad valuation.

Now, as I see it, the objections urged in the report against the reliability of the cost of acquisition of lands, when it has been ascertained, are of much greater force when urged against the ascertainment of the so-called present value, or acreage value. Now, when the acreage value or present value of the lands has once been ascertained, as it has been ascertained by the commission, then all of the difficulties disappear. The commission has gotten over the difficulties of the law whenever it has reached a conclusion and finding as to the acreage value of the land. It is like a condemnation suit where you go into court, and there are two issues: First, what is the market value of the land taken? Secondly, what is the damage to the residue? Now, in this particular case the commission has solved one of those problems: it has found the market value of the land.

Now, whether the road is to be assumed to be obliterated and rebuilt, or assumed to be not there, or any other assumptions that may be necessary, is beside the question, so far as this particular matter is concerned, because the commission has found the market value of the land to be condemned, and only one question remains, and that is to ascertain what it will cost by the application of the rule in condemnation to acquire the lands, the market value of them being one of the conceded facts at the beginning of the case.

In other words, you take a farm of 160 acres, and the railroad crosses it. The commission has found the market value per acre of that farm. Now, the cost of acquisition of the right of way through that farm, once you know the market value per acre, is not a difficult thing. The commission has already found the 160 acres' value. All it has to do is to proceed one step further and take out the right of way, which we will say is 5 acres, and find the value of the remaining 155 acres. If it can find the value of the 160 acres, it certainly can find the value of the 155 acres.

Senator KELLOGG. The commission are not doing that, as a matter of fact; they are applying some general rule to the whole thing, aren't they?

Mr. MOORE. Yes, sir. They are, however, making the general rules from the specific instances such as I have just enumerated.

Senator KELLOGG. Yes.

Mr. MOORE. That is to say, they take the railroad and divide it up into types, agricultural land in one type and urban property, industrial property, and so on and so on, and then from specific instances, from actual transactions, they ascertain the relation between the acreage value of the property and its cost of acquisition, and then when they have ascertained that ratio they apply that to the acreage value of all the property in that particular type.

The CHAIRMAN. Mr. Moore, under the arrangement, giving due allowance for your interruptions, your time has expired.

Mr. MOORE. May I file this memorandum I have prepared with the committee?

Senator UNDERWOOD. Do you want it printed in the record?

Mr. MOORE. Yes.

The CHAIRMAN. Very well.

(The memorandum presented by Mr. Moore is as follows:)

I.

THE EXPRESSION "PRESENT VALUE," AS USED BY THE COMMISSION, DOES NOT PURPORT TO BE THE REAL PRESENT VALUE OF RAILROAD LANDS.

If the bill becomes a law, it will relieve the commission of the duty now imposed upon it to ascertain the present cost of acquisition of railroad lands, but will still require it to ascertain and report the so-called present value of railroad lands. But the "present value," as defined by the commission, is not the present value in any proper sense. It might more properly be called "acreage value." It is determined, as stated in the subcommittee's report, page 3, "by ascertaining the value of adjacent lands or lots and attaching the same value, area for area, to the railrod lands and lots." No informed person will claim that railroad right of way can be acquired on this basis. It results from constitutional provisions against the taking or damaging of private property for public use without just compensation, that, in practice, right of way costs much more than the acreage value.

A typical illustration may be given from the records of the commission in its investigation and valuation of the lands of the Kansas City Terminal Railway Co. That company acquired certain lands in 1910 by condemntion, and paid therefor the sum of $2,400,000. This is a court record. The so-called present value of these same lands, as computed by the commission, is $1,400,000. No one will contend that the so-called present value is the real value. This illustration is typical of substantially all cases in the United States where right of way has been acquired within recent years. It would be most unjust to say that property which cost in condemnation proceedings $2,400,000 should only be valued at $1,400,000, and that the company owning the property should only be permitted to earn a 6 per cent return under the transportation act upon the latter sum.

II.

IF THE BILL PASSES, THE COMMISSION WILL BE REQUIRED TO CONTINUE ITS PRESENT ERRONEOUS PRACTICE IN THE DETERMINATION OF SO-CALLED PRESENT VALUE.

In the report of the subcommittee, page 3, it is recognized that the methods employed by the commission in ascertaining so-called present value may be erroneous, but it is insisted that this error may be subsequently corrected. It says:

"It may be that the commission is not employing sound principles in ascertaining what the statute calls the present value of lands. If it is not, the mistake will be unfortunate, but may hereafter be corrected."

But this entirely overlooks the well-recognized rule of law that where Congress, knowing the construction which the commission has placed upon a statute, reenacts the statute without alteration in he particular matter construed, this amounts to a legislative adoption of such construction. Congress knows how the commission has construed the expression "present value." This information is contained in the reports which the commission has made to Congress. It is now proposed by the pending bill substantially to reenact paragraph second, quoted on the first page of the subcommittee's report, eliminating the provision concerning cost of acquisition of lands, but retaining the provision concerning "present value." If the bill passes, it amouts to a reenactment by Congress of the statute imposing upon the commission the duty of ascertaining "present value" of lands, and the implied adoption by Congress in such reenactment of the erroneous method which the commission has employed. In other words, the construction which the commission has placed upon the expression "present value" will be "treated as read into the statute."

A decision of the Supreme Court directly in point is New York, New Haven & Hartford R. R. Co. *v.* Interstate Commerce Commission, 200 U. S., 361 (50 L. ed., 515), where the third syllabus properly reflects the opinion of the court, and is as follows:

"The prohibitions of the act to regulate commerce as to rebates, favoritism, and discrimination having been construed by the Interstate Commerce Commission, charged with its execution, to be inapplicable to the freight rates for coal charged by interstate carriers empowered to mine and market coal by their charters or by legislation existing at the time of the adoption of the act, this construction, which has long obtained in practical execution and has been impliedly sanctioned by the reenactment of the statute without alteration in the particulars construed, must be treated as read into the statute."

The passage of the pending bill, therefore, will amount to an approval by Congress of the commission's practice in determining acreage value and labeling it "present value." Any court in construing the expression "present value," if the bill becomes a law, will be compelled to say that the commission's construction must be read into the new law, and that what Congress meant was that the commission should continue its present practice. It is futile, therefore, to say that the commission's mistake "may hereafter be corrected." It will then be too late to correct the mistake.

III.

THERE IS NO REAL DIFFICULTY IN ASCERTAINING THE PRESENT COST OF ACQUISITION OF RAILROAD LANDS.

The surprising statement is made in the report of the subcommittee, page 3, that it is "absolutely impossible to ascertain what it would cost any given railroad company to acquire its present right of way or lands at the present time."

In the first place, this precise claim was made before the Supreme Court of the United States in the Kansas City Southern mandamus case, and there overruled. The opinion in that case (252 U. S., 178) sets forth the commission's own statement, where the alleged impossibility of ascertaining the reproduction cost of lands is emphasized, as follows:

"We are unable to distinguish between what is suggested by the carrier in this record and nominally required by the act and what was condemned by the court (in the Minnesota Rate cases (Simpson *v.* Shepard), 230 U. S., 352, 57 L. ed. 1511; 48 L. R. A. (N. S.) 1511; 33 Sup. Ct. Rep. 729; Ann. Case. 1916A, 18) as beyond the possibility of rational determination; nor is there any essential difference in the actual methods there employed and those now urged upon us. Before we can report figures as ascertained we must have a reasonable foundation for our estimate, and when, as here, if the estimate can be made only upon inadmissible assumptions and upon impossible hypotheses, such as those pointed out by the Supreme Court in the opinion quoted, our duty to abstain from reporting as an ascertained fact that which is incapable of rational ascertainment is clear."

* * * * * * *

"Because of the impossibility of making the self-contradictory assumptions which the theory requires when applied to the carrier's lands, we are unable to report the reproduction cost of such lands or its equivalent, the present cost of acquisition and damages, or of purchase in excess of present value."

Surely no more appropriate language could be employed to place before the Supreme Court the commission's contention that the command of the statute involved an absolute impossibility. The Supreme Court thoroughly understood the commission's position. This is apparent, because it said:

"It is true that the commission held that its nonaction was caused by the fact that the command of the statute involved a consideration by it of matters 'beyond the possibility of rational determination' and called for 'inadmissible assumptions,' and the indulging in 'impossible hypotheses' as to subjects 'incapable of rational ascertainment,' and that such conclusions were the necessary consequence of the Minnesota Rate cases (Simpson *v.* Shepard, 230 U. S., 352; 57 L. Ed., 1511; 48 L. R. A. (N. S.), 1151; 33 Sup. Ct. Rep., 739; Ann. Cas. 1916A. 18)."

It is apparent, therefore, that the commission's contention was neither overlooked nor misunderstood. The court, in its decision, distinctly and specifically disapproved the commission's position, its reasoning, and its conclusions. After stating the commission's construction, as quoted above, the court said:

"We are of opinion, however, that, considering the face of the statute and the reasoning of the commission, it results that the conclusion of the commission was erroneous."

It appears, therefore, as a matter of law, that any contention now made that it is "absolutely impossible" to ascertain present cost of acquisition of lands is in the very teeth of the decision of the Supreme Court of the United States directly to the contrary.

As a practical proposition there is no difficulty in estimating the present cost of acquisition of lands in a satisfactory manner and with reasonable accuracy. It is to be borne in mind that the commission has ascertained the so-called present value, which, as above stated, in reality is the acreage value. With this acreage value as a basis, there is no difficulty involved in proceeding one step further and ascertaining the present cost of acquisition. The problem is solved by the application of the familiar rule in condemnation proceedings that where an entire parcel is taken the measure of damages is its market value, and where only a part of an entire parcel is taken the measure of damages is the market value of the part taken plus the damage to the residue. This is a problem which juries are solving almost daily from one end of the country to the other. What a jury can do and does do with a reasonable degree of satisfaction certainly is not beyond the powers of the Interstate Commerce Commission with its corps of trained assistants and employees.

Take, for illustration, a right of way through a 160-acre farm. The present value of the farm, which, let us assume, is $300 per acre, has already been determined by the commission as a part of its determination of so-called present value. Knowing the acreage value of the entire farm and the acreage included within the right of way, the only remaining question is, What is the damage to the residue? In other words, what is the value of the entire 160 acres before the theoretical condemnation and what is the value of the remaining 155 acres after the theoretical condemnation of a right of way containing 5 acres? The difference between these two sums is the cost of acquisition. Surely no one can contend that it involves a problem of any difficulty, much less an impossible task.

IV.

THERE IS NO BASIS FOR THE STATEMENT CONTAINED IN THE SUBCOMMITTEE REPORT TO THE EFFECT THAT "THE RESULT OF THE WORK WHEN DONE WILL BE VALUELESS AND MISCHIEVOUS."

It is difficult to understand the basis for the assertion that the result of the work will be "mischevous." If the commission ascertains present cost of acquisition of lands, it will be one of the many pieces of evidence material, competent, and relevant to the issue of final value. It is for the commission, in the exercise of its quasi judicial functions, to give to this particular piece of evidence such weight as, in its judgment, it may merit. The commission may or may not conclude that it is entitled to any probative effect. How can it be said at this time that the result of the work will be "mischevous" unless we indulge the inadmissible assumption that the commission may make an improper use of it? How can Congress, in the exercise of its legislative function, determine that evidence offered before a judicial body must be rejected because its effect might be "mischievous"?

Neither is there any foundation for the statement that the result of the work when done will be "valueless." It is held in Smyth *v.* Ames (169 U. S., 466–546) that "the present as compared with original cost of construction" is a proper matter for consideration in determining the value of railroad property. Present cost of acquisition of lands is part and parcel of the present cost of construction, and is, therefore, competent, material, and relevant evidence to be considered by the commission in its determination of final values. As before stated, the probative effect of this evidence is for the commission, in the exercise of its quasi judicial functions, to determine. How can the legislative power say in advance that a certain piece of evidence will be "valueless"? Is that not a question for the body exercising judicial functions to determine?

V.

EVERY OBJECTION URGED IN THE REPORT TO THE ASCERTAINMENT OF PRESENT COST OF ACQUISITION OF LANDS APPLIES WITH GREATER FORCE TO THE ASCERTAINMENT OF SO-CALLED PRESENT VALUE.

As before stated, with the commission's so-called present value as a basis, the ascertainment of present cost of acquisition presents no real or practical difficulty. The objections urged will be taken up seriatim.

It is said, "it is evident that the figure reported can be only an estimate, since the amount which would actually be paid would depend to a considerable extent upon circumstances and conditions which can not be definitely described." This is true of the ascertainment of so-called present value. It is an estimate, based upon judgment.

Again, "If a community is eager for the construction of a railroad the right of way can be obtained at a much lower figure than as though the building of the road is opposed by that community. So, too, the attitude of the carrier might exercise a considerable influence upon the amount of money expended in the acquisition of its lands." This also goes to the question of the so-called present value of lands.

And again, "It is also apparent that if the railroad did not exist the present value of lands adjoining and adjacent to the railroad would not exist." This also goes to the question of the so-called present value of lands, which the commission has found, and has encountered no difficulty in so doing.

Still again, "The management of one railroad might deem it for its advantage to pay liberally, thus cultivating the good graces of the community, while another might deem it better business to force many cases into court, thereby obtaining a better price where purchases were made." This consideration again bears upon the question of so-called present value, which, as before stated, has been ascertained by the commission and is accepted as the basis for the computation of present cost of acquisition.

The following surprising statement is made in the report:

"In order to do this (ascertain present cost of acquisition) it must be first assumed that the railroad has not been constructed and is not in operation, for it would be outrageously unjust to find a value largely contributed by the existence of the railroad and then multiply that value by 2, 3, or 4, because a right-of-way strip would cost more per acre than the adjacent farm is worth per acre."

Why is it necessary to assume that the railroad has not been constructed and is not in operation? Any lawyer knows that the title to right of way is frequently acquired after a railroad has been constructed and is in operation, when the title to the particular right of way fails by reason of the foreclosure of an underlying lien or for some other reason. In such a case a purchase is made, or the company condemns the right of way, pays the award of the court, and so acquires title. No one thinks of assuming the nonexistence of the railroad or of stopping the operation of trains. The same method may be applied in ascertaining present cost of acquisition.

Why is it "outrageously unjust" to find a value largely contributed by the existence of the railroad? That is precisely what the commission has done in the determination of its so-called present value. If a railroad has been recently constructed, as in the case of the Kansas City Terminal Railway, above referred to, it has to pay for its right of way not only on the basis of present values but largely in excess of the so-called present value by way of severance

damages. Is it "outrageous" to value the lands of such a road at what they cost? Does it not necessarily follow that its competitor, which acquired its lands 30 or 40 years earlier, should have them valued on the same basis? Is that not a matter for the commission to pass upon?

VI.

THE PUBLIC WILL SUFFER NO INJURY IF THE COMMISSION IS PERMITTED TO ASCERTAIN THE PRESENT COST OF ACQUISITION OF LANDS, WHETHER DONATED OR PURCHASED FOR A FULL CONSIDERATION.

It is said in the report that "A considerable proportion of the right of way now being used by railroad companies was either donated or conveyed for a small consideration," and the question is asked whether this would not happen again if the railroads were destroyed? This argument was also unsuccessfully made before the Supreme Court of the United States in the Kansas City Southern mandamus case. A sufficient answer is that the valuation act (section 19a of the interstate commerce act) provides, in paragraph fifth, that the commission shall ascertain and report the amount and value of any aid, gift, grant of right of way, or donation made to each common carrier or to any previous corporation operating such property by the Government of the United States or by any State, county, or municipal government, or by individuals, associations, or corporations. It is also required to ascertain and report grants of land to any such common carrier or any previous corporation operating such property by the Government of the United States or by any State, county, or municipal government, and the amount of money derived from the sale of any portion of such grants and the value of the unsold portion thereof at the time acquired and at the present time; also the amount and value of any concession and allowance made by such common carrier to the Government of the United States or to any State, county, or municipal government in consideration of such aid, gift, grant, or donation.

It is thus apparent that the law wisely provides for the ascertainment of the present cost of acquisition of all lands, however acquired, and, separately, a statement of lands acquired by Government donation or grant. This is evidence competent, relevant, and material to the issue. The probative effect of such evidence is for the commission to determine.

The CHAIRMAN. We will hear from you, Mr. Benton.

Mr. JOHN E. BENTON. I would like Mr. Farrell to precede me, if it is agreeable, Mr. Chairman.

The CHAIRMAN. Very well.

STATEMENT OF HON. P. J. FARRELL, CHIEF COUNSEL INTERSTATE COMMERCE COMMISSION, WASHINGTON, D. C.

Mr. FARRELL. Mr. Chairman and gentlemen of the committee, I have been sent here by the members of the Interstate Commerce Commission to state the reasons why they think this bill should be passed. In the first place, the law in its present form requires the commission to spend a lot of time and a large amount of money——

The CHAIRMAN (interposing). You mean the law in its present form?

Mr. FARRELL. In its present form—without getting anything in return which can be used at all in determining the value of the property of a railroad company. For the reason that, as you will observe by an examination of that paragraph entitled "second," which is under consideration here, before you get to the portion of that paragraph which the bill proposes to eliminate, you have required the commission to do everything that it will be possible to do in connection with the valuation of land.

I have been over it so many times that I do not need to refer to it, but I can give it to you:

Second. Such investigation and report shall state in detail and separately from improvements the original cost of all lands, rights of way, and terminals owned or used for the purposes of a common carrier, and ascertain as of the time of dedication to public use, and the present value of the same.

So that when you have gotten that far you have required the Interstate Commerce Commission to do everything that it would be possible to do in valuing the lands of a common carrier which have been dedicated to public use and are used for common carrier purposes.

But you do not stop there.

Senator KELLOGG. Let me ask you right there, if it will not interrupt you—and I will not take up much of your time—what basis did they use for determining the present value?

Mr. FARRELL. They have not yet determined the present value, Mr. Senator, and that is one of the difficulties here. They have determined what they call the present value, and have told how they determined it.

They have valued the property in the right of way on the basis of the value of similar adjoining and adjacent lands, and they have treated the original cost of that same land as a fact to be determined by going to the carrier's own records and taking every dollar that has been put down in those records as cost of the land.

Senator KELLOGG. Now, wait a minute.

Mr. FARRELL. I want to answer your question fully, because it is a pertinent one.

Senator KELLOGG. All right.

Mr. FARRELL. When it comes to the question of determining the present value of those lands for the purpose of determining a value upon the entire railroad property, that has never been done. And when the commission does undertake that job what will it consider? It will consider both the amount of money that the carrier has invested in the land when it was dedicated to public use and the present value of that land as measured by the value of similar land in the same vicinity, and then fix a present value which may be different from the original cost or different from the present value as measured by the market value of similar land in the same vicinity.

Senator KELLOGG. Well, I do not pretend to say one way or the other, but I read somewhere a statement of the commission that when they came to determine the present value of the railroads they determined it as a whole, but they say in this statement that their determination of the present value of the land is the value of the acreage propery. They say that directly. Now, what do they mean by that?

Mr. FARRELL. They mean that they have found a present value which has been found in that way and can be found in no other way.

Senator KELLOGG. Very well.

Mr. FARRELL. But they are considering that as simply one element——

Senator KELLOGG. That is true.

Mr. FARRELL. Of the value of the railroad when they come to fix the value of the property as a whole.

Senator KELLOGG. But they have determined that the language in the statute where it says "present value" means the present acreage value of the property, have they not?

Mr. FARRELL. Senator, I have to disagree with that, because I was solicitor of the Bureau of Valuation for four years, except a few days, and since I became chief counsel of the commission I have been connected with the valuation work because of my former connection with the Bureau of Valuation; and what the commission has done is the best they could do. They could not fix a present value of the lands used for common-carrier purposes without telling how they did it, and the way they are fixing that present value—that is, reporting as present value for the time being—is by comparing the land included in the rights of way, yards, and terminals with land which is not; but it does not mean that that will be the amount in dollars and cents put into the value of railroad land when that is fixed.

Senator KELLOGG. It certainly does not mean that that will be the value—the final value—of the railroad property.

Mr. FARRELL. There is no way in the world that I can conceive of that a carrier can be deprived of a single cent that it has, in fact, invested in those lands for common-carrier purposes when they were dedicated to public use, because the statute requires the commission to report the amount of money they invested in those lands when they were dedicated to public use, and if the commission is not able to report it it will only be because the carriers have not kept their books in such a way that the commission can obtain the information.

But what is true of lands in that particular is not always true of other property. It is true that as a general proposition the commission can get the original cost of the lands. It is not always true to the same degree that it can get the original cost of the structures.

Senator UNDERWOOD. I would like to have your reflection on one point. It is a material point, in my mind. I do not know whether I am wrong or right about it. It is suggested by those who represent the railroad side of the question here that if this bill passes it will leave out the ascertainment of fact that they contend may be material in the court's ascertaining real value, and that if it is left out it may require a new valuation. Now, I would like to know what you have to say on that subject?

Mr. FARRELL. I can simply give the committee my opinion. I think that if this bill is passed it will afford an opportunity of saving the money that is now being wasted in making these speculative estimates, and in any event if a court should hereafter require that kind of a speculative estimate to be made, the guess can be just as well made in the future and at just as small expense as it can be made now, because it can not be anything but a guess in any case.

Senator UNDERWOOD. Well, of course, the other side contends that it is not a guess. The proponents of this bill contend it is. But the question is, if we eliminate the ascertainment of that fact that now is required by law, and the courts should take the other side's viewpoint, will not that materially delay the final ascertainment of value?

Mr. FARRELL. It will not delay it any more then than now, for the reason, Senator, that to-day with that clause in the act the commission is absolutely at the mercy of the carriers' representatives concerning this valuation work. And let me explain what I mean by

that, because it is quite a strong statement. Unless the commission will speculate—I do not call it an estimate, because nobody that understands it can conscientiously give it any such dignified name as "estimate." The word "estimate" is erroneously applied to an opinion expressed which has no reasonable foundation upon which to rest, and it has been absolutely impossible to find any reasonable foundation upon which to rest any such an estimate as they are talking about.

Senator UNDERWOOD. That goes to the value of the testimony, though, and not to the fact. Of course, the court will determine that.

Mr. FARRELL. Now, then, to proceed with what I said in the first place. I made the statement that under present conditions the commission is at the mercy of the representatives of the carriers in this valuation work. Let me explain to you what I mean by that, because, as I said before, it is a strong statement. Unless the commission will make an estimate that is satisfactory to the carriers' representatives, they threaten to proceed parcel by parcel all over the lines of the different railroads, and if they should undertake that, of course there is nobody in this room that would live long enough to see the valuation completed, to say nothing about the expense it would involve both to the railroads and to the general public. The natural result of that condition would probably be that as long as nobody could ever make an estimate that could be relied upon as anywhere near accurate—nobody would know whether it was accurate or otherwise, as far as that is concerned—some agreement would probably be made, some compromise, by which the carriers would get about what would satisfy them, and then that would be put into the record as a so-called estimate of the present cost of condemnation and damages, or of purchase in excess of the original cost.

Senator KELLOGG. But the commission can do their work in their own way.

Mr. FARRELL. That is just the trouble; and if the commission should insist upon trying to do this in a way that would be anything more than a guess, then the carriers would say: "Unless you will grant us a certain multiple we will take so much time that you can never complete this valuation, because we will go over this road parcel by parcel." And you can imagine what going over one line 10,000 miles long will mean.

Senator KELLOGG. Oh, the commission is not obliged to do that. It can do as it pleases.

Mr. FARRELL. Can you shut them off arbitrarily? If you do, your action can have no force in court.

Senator KELLOGG. Mr. Prouty says in his testimony before this committee that the work is about one-half done, and it is proceeding satisfactorily.

Mr. FARRELL. Well, let me say to you, because I have been with it just about as long as Mr. Prouty has, that when Mr. Prouty says that I know what Mr. Prouty means, because I have been with him. He means that if you will base your estimates upon these unwarranted assumptions, then it is easy enough to make a guess.

Senator KELLOGG. Well, the commission are basing estimates in that way, are they not?

Mr. FARRELL. The commission has gone on for some time under the decision in the Kansas City mandamus suit, and has been speculating, and what it has obtained is of no use to the commission or anybody else.

Senator KELLOGG. Well, that remains to be seen whether it is or not. I think we had better have Mr. Prouty up here and find out.

Mr. FARRELL. I guess you will have some difficulty, Senator, in getting Mr. Prouty here. He has been a sick man since last December.

Now, I say it is impossible to discover any reasonable basis upon which to rest the estimate of present cost of condemnation and damages or of purchase in excess of such original cost or present value. Why is it impossible? Simply because you have got to assume in the first place—and which they contend you should—that if there were no railroad there the values which have been built up by the construction of the railroad and the investing of millions of dollars in the vicinity of the railroad by private persons and corporations, would still be there. That, of itself, as the Supreme Court said in the Minnesota rate cases, is impossible, and can not be entertained. In other words, it said the assumption of nonexistence of the railroad and at the same time that the value that rests upon it remains unchanged is impossible and can not be entertained.

Senator STANLEY. Let me see if I understand you. Under the act of 1920, the transportation act of 1920, you are required to take into consideration the cost of condemnation, among other elements.

The CHAIRMAN. Under the act of 1920?

Mr. FARRELL. The valuation act. There is nothing said about condemnation in it.

Senator STANLEY. Under the present law you are required to take that fact into consideration.

Mr. FARRELL. Take the condemnation under consideration?

Senator STANLEY. Yes.

Mr. FARRELL. I don't know of anything there that requires the commission to take the condemnation under consideration. I do not find any such thing there.

Senator STANLEY. Is not that the purpose of this bill, to change existing law?

Mr. FARRELL. Perhaps I do not understand what act you are referring to, Senator. Are you referring to the transportation act or the valuation act?

Senator STANLEY. The valuation act. This present act. This is proposed as an amendment to the existing law.

Mr. FARRELL. If you are referring to the clause under consideration here, it says, "and separately the original and present cost of condemnation and damages or of purchase in excess of such original cost or present value." Those are the words. Now, what does that mean? Nobody has ever yet been able to tell definitely what that means.

Mr. BRANTLEY. The commission has decided it.

Mr. FARRELL. The commission has guessed at a lot of things, for the reason that the court has said it is compelled to go on and speculate because Congress required it to do so. When I argued this case in the Supreme Court of the United States the Chief Justice referred to these estimates that we are talking about here as speculative esti-

mates, and the Chief Justice was further of the opinion that, notwithstanding the decision of the Supreme Court in the Minnesota Rate cases, the Congress had deliberately, after that decision was rendered, gone on and required the commission to obtain this information, or make this speculative estimate, and it was in no position to state that the Congress, having the authority, should not require them to do whatever the Congress saw fit to compel them to do. But when the decision was first written up the Chief Justice in his opinion said that the Congress acted after the Supreme Court rendered its decision in the Minnesota Rate cases. His attention was called to the fact that that was an erroneous statement and that the Congress acted first. Thereupon he changed the phraseology so that that erroneous statement does not now appear in the printed reports.

Senator STANLEY. What I wanted to get at was this: In estimating the probable cost of condemnation are you required to review each separate parcel that they acquired and apply that standard to each?

Mr. FARRELL. They are free to go over the road parcel by parcel unless they are satisfied with the guess the commission makes.

Senator STANLEY. You hold that they have the right to be heard upon every parcel?

Mr. FARRELL. Upon every parcel of it.

Senator STANLEY. That they have the right to be heard upon every parcel of it in reference to this matter?

Mr. FARRELL. Yes. Estimate parcel by parcel.

Senator KELLOGG. Where does the law give them any such right?

Mr. FARRELL. Why, the law does not shut out the right; that is why they have it.

Here is another thing about it: How are they going to estimate the present cost of condemnation and damages when nobody knows how much of the land they would have to buy, how much of it they would have to condemn, or how much of it would be donated? And everybody knows that they did not condemn much of it when the roads were constructed; that a lot of it was given to them; and that only a comparatively small part, perhaps not much over half, was in fact purchased, and what was purchased was in many cases purchased for less than the acreage value of the land, if you please, at that time, because of the fact that the people who were selling the land to them wanted a railroad in that vicinity.

Mr. BRANTLEY. What is the difference between that and getting at the acreage value? Wouldn't the same principle apply?

Mr. FARRELL. The acreage value is a matter which can be estimated, because you can find out what the land in that vicinity, generally speaking, is worth. Now, the Supreme Court said that where they did not pay any more for the land than the present value of land in the vicinity having a similar character the present value of land in the same vicinity having a similar character is the maximum that can be allowed. It did not say what should be done when they can show that they paid more than that, and the Interstate Commerce Commission has never in one instance cut out any excess that they could show they paid over what the present value, as measured by the value of similar land in the vicinity, would amount to, never in one instance, and any statement that is made here indicating that there is any fear that a railroad company will not get

as much as it has invested in its land has no basis at all on which to rest, if the basis they are looking for is to be found in the records of the Interstate Commerce Commission. Now, when the commission does allow them any less, as to dollars and cents, to be included for their lands, in fixing the final value of their railroads, then they can make complaint, but certainly they can not complain up to that time, until such a thing has happened; and, as the subcommittee has said, if such a thing should happen, of course it can be corrected by the court, because the data would all be before the court, and it would not require any return to the commission for the purpose of making any new investigation at all.

Now, if your honors please, I have, perhaps, been a little more emphatic than I would be expected to be under the circumstances, but it is because I feel that misrepresentations have been made—I do not say intentionally—but because of sometimes a fear that something will happen in the future that will do a railroad some harm, and that has caused statements to be made which have no basis in fact.

The commission has made a great many tentative reports, and it has always attempted to show to the best of its ability—and its ability in that respect is measured by the accuracy of the carriers' records—every dollar that the carriers have put into their lands, as shown by the carriers' own records, and it is continually reporting every dollar that they have invested, and if they are not trying to get the railway values—which was condemned by the Supreme Court in the Minnesota Rate cases—what are they trying to get?

These speculative estimates as to what the railroad company would have to pay for the land more than the land would be worth to others—because that is what it comes to—are based upon the theory that something more would have to be paid for it, because it was obtained for railway purposes, than would be paid for it if it were purchased for some other purposes. So that what they are endeavoring to compel the commission to report is a value for railway purposes which is different from the value for other purposes, and which was condemned as a distinction that could not be sustained by the Supreme Court of the United States in the Minnesota Rate cases.

Senator KELLOGG. Well, this law as it stands does not determine that question at all.

Mr. FARRELL. The trouble with the law, Senator, is, as I said before, that it requires a speculative estimate that can not be made use of as evidence, and that the amount of time consumed in making these guesses and the amount of money expended in doing that work depends upon whether the carriers would prefer to go ahead and get the evidence of their so-called expert witnesses as to these speculative estimates, or whether they would be content with such a guess as the commission might see fit to make. I can not call it anything but a guess, because it is very evident that it could not be anything but a guess.

In the first place, you have got to assume that if it became necessary for them to reacquire the lands—which you know it never will be—the values that are there now will still remain.

In the next place, you must assume that those lands are owned not by the railroad companies but by the adjoining landowners,

and when you come to that point it is impossible, for the reason that, as I say in a brief that I prepared for the Supreme Court in a Texas case, and I quote from the statute, even if the railroad company forfeits its franchise, still the land that is acquired for right of way purposes does not go back to the adjoining landowners or to anybody else, but remains land to be used by the State and turned over to some other corporation to use for railroad purposes. The idea that you could get the titles to these lands back to the adjoining landowners, of course, is impossible, just as much as the idea that the values that are there now would be there if there was not any railroad. Both of those things are impossible. Nevertheless you must assume both of those things before you can even start on an estimate of cost of condemnation and damages or of purchase in excess of such original cost or present value.

But you can see that you have not even then gotten anywhere, because here is another thing to be considered, and to my mind it is enough of itself, if I did not consider anything else. Suppose, for the purposes of considering this theory—because you can not call it anything else—you would try to find what it would cost them to reacquire those lands for railroad purposes if they did not own them. The first thing you must do is to imagine that the railway is not there, and that it is therefore necessary for you to reacquire the land and put the railroad there. Now, when you undertake to do that in your own mind just see what you will be up against. You imagine that the railroad is removed one moment, and the next moment you reconstruct it, and of course it would have to obtain those lands for the purpose.

But the thing that they make the most of and the thing that they say would be the one thing of all others that would make the land cost the carriers more than the value of it for other purposes is that you would go through a 160-acre tract of land and take a narrow strip 100 feet wide. There are not so many of them 100 feet wide; some of them are 200 feet wide, and a good many of them are 400 feet wide, so far as that is concerned. But suppose you disposed of your railroad. What do you do with your 100-foot strip that you have there now? "Well," they say, "we will put the title of that back into the adjoining landowners." Now, can you imagine how that 100 feet, or any other land that adjoins it on either side of the railroad, could be in any manner or to any extent damaged by one minute taking the railroad away and the next minute putting it back? And still that is the theory upon which they proceed.

Senator UNDERWOOD. I do not understand, Mr. Farrell, exactly your procedure, and I am probably very ignorant about the matter, and therefore I ask the question for information. But what you are trying to do is to ascertain present value, is it not?

Mr. FARRELL. Yes, sir.

Senator UNDERWOOD. Well, is not the present value ascertained if you took the proposition, saying that the railroad is there, and that you are going to build a new railroad to parallel it? In other words, to acquire 100 feet lying immediately adjacent to the present line, and what it would cost to acquire it; is not that the real issue?

Mr. FARRELL. No; we do not proceed upon the theory of building a line like it. We proceed upon the theory of building the identical line, and putting it in its present condition.

Senator UNDERWOOD. Is not that the present value—what it would cost a new railroad to build it?

Mr. FARRELL. No; because that is an expense that the imagination does not permit you to say has ever been incurred, or ever can be incurred, because the railroad will, of course, never be disposed of.

Senator UNDERWOOD. Well, I may be wrong, because I have not followed the line of the decisions of the Interstate Commerce Commission in this valuation act; I may be ignorant of the subject; but, as I understand, they are trying to ascertain present value, and the present value of that right of way would seem to me to be not what it cost them or not what the replacement value would be, but it would be what it would cost to build a road that paralleled the present track.

Mr. FARRELL. That is not the theory upon which they are proceeding. They are not undertaking to build parallel tracks at all. They are taking that identical railroad and trying to estimate——

Senator UNDERWOOD. I know; but would not the present value be ascertained by what it would cost to duplicate that on the other side of the 100 feet?

Mr. FARRELL. I think not, Senator Underwood. I do not think that would be the proper way to get the present value of the present railroads.

Senator MYERS. What would be the trouble with this sort of procedure, Mr. Farrell: To just imagine that the railroad is not there and does not own its right of way, and that the land is intact and unsevered and in a compact body, but everything else but the railroad is there—the farm is there, the improvements, and everything except the railroad—and to ascertain the value of the land per acre, and then proceed just as a court would proceed? What damages will result from taking a strip of land out of a tract and allowing a railroad to be built upon it, and what benefits will accrue? And do the benefits exceed the damages, or do the damages exceed the benefits? And then adjusting it and finding a difference and allowing that as a measure of damages and condemnation. That is, if it damages the land, add the damages to the value of the right of way, and if it benefits the land more than it damages deduct the benefit from the value of the right of way, just as a court would do. And say that now is the present value of this right way. And the cost of building the road would be added to the value of the land in condemnation and damages, and that would be the present cost of the railroad. Could not that be done easily?

Mr. FARRELL. It could not be done unless you are willing to indulge in the absolutely unwarranted assumptions that the present values would remain if the railroad were not there, and that the title to the land could be put into the names of the adjoining owners, and everything except the railroad itself would remain there. But the Supreme Court has said that all those assumptions are unwarrantable and can not be entertained.

Senator MYERS. You could get back then to the question of unearned increment.

Mr. FARRELL. No. You see, the railroad is there, and every damage to the adjoining land that can be done has already been done and paid for, and that has been put into the original cost. Now there can not be any new damage to the adjoining land.

Senator KELLOGG. We have taken a good deal of Mr. Farrell's time, and I think he ought to be allowed additional time, Mr. Chairman.

The CHAIRMAN. We will find it necessary to postpone the hearing until 11 o'clock to-morrow, and at that time Mr. Benton or Mr. Farrell, either, will have one-half hour to conclude this statement.

Mr. FARRELL. If Your Honors will allow me to put in as a part of my remarks my brief in the Supreme Court, I would like to do so. It is short, and I have discussed this matter very thoroughly.

The CHAIRMAN. That will be done.

(The brief presented by Mr. Farrell is as follows:)

BRIEF FOR INTERSTATE COMMERCE COMMISSION.

In the Supreme Court of the United States. October term, 1919. United States of America, at the relation of Kansas City Southern Railway Co., v. Interstate Commerce Commission of the United States. No. 413.

STATEMENT.

Plaintiff in error, hereinafter called appellant, a common carrier subject to the act to regulate commerce, requests the court to issue a writ of mandamus commanding defendant in error, hereinafter called the commission, to receive certain evidence which it has refused to receive in a proceeding now pending before it, entitled "In the Matter of the Valuation of the Property of the Kansas City Southern Railway Co. et al."

By section 19a of said act, commonly called the valuation act of March 1, 1913, the commission is required, among other things, to "investigate, ascertain, and report the value of all the property owned or used by every common carrier subject to" the act to regulate commerce, and paragraph entitled "Second" of the valuation act reads:

"Second. Such investigation and report shall state in detail and separately from improvements the original cost of all lands, rights of way, and terminals owned or used for the purposes of a common carrier, and ascertained as of the time of dedication to public use, and the present value of the same, and separately the original and present cost of condemnation and damages or of purchase in excess of such original cost or present value."

To the extent the commission is required by said paragraph to ascertain and report separately the "present cost of condemnation and damages or of purchase in excess of original cost or present value" of the lands included in the rights of way, yards, and terminals of common carriers, it has never been able to comply therewith. It has, however, permitted appellant and other carriers, including the Texas Midland Railroad, to introduce in proceedings before it a large volume of evidence, the effect of which was to prove what had previously been demonstrated by this court in its decision in the Minnesota Rate cases (230 U. S., 352), namely, that it is impossible to comply with this requirement of the valuation act, because no lawful or reasonable basis upon which to rest an estimate of such cost can be discovered.

After the commission had rendered its decision in the Texas Midland case (1 I. C. C. Val. Rep., 1), in which evidence of the character mentioned had been submitted to it for consideration, appellant asked for and was given permission to introduce in the Kansas City Southern case before an examiner of the commission at Kansas City evidence which appellant claimed would tend to establish the present cost of condemnation and damages or of purchase of the lands included in the rights of way, yards, and terminals of the railroad used by appellant as a common carrier in serving the general public. At the hearing before said examiner, appellant introduced such evidence to the extent that it was then prepared to do so, all of which was received by the examiner. Thereafter, however, appellant asked the commission to permit it to introduce additional evidence of the same character and this request was denied for the reason stated by the commission in its decision in said Texas Midland case, whereupon appellant brought this action and ask for a writ of mandamus as above stated.

In the Supreme Court of the District of Columbia appellant filed a demurrer to the answer of the commission, which was overruled, and upon appeal the ruling of the Supreme Court was affirmed by the Court of Appeal. From these rulings appellant appeals to this court.

ARGUMENT.

I. To estimate the present cost of condemnation and damages or of purchase of lands included in appellant's railroad is impossible, because it necessarily involves unwarrantable and unlawful assumptions.

The valuation act was approved by the President and became effective on March 1, 1913. At that time there were pending in this court, on appeal from the Circuit Court for the District of Minnesota, the Minnesota Rate cases above mentioned, wherein an attempt had been made to estimate the present cost of acquiring the lands included in the rights of way, yards, and terminals of certain common-carrier railroads. To this method of procedure, which this court characterized as an attempt to apply the cost-of-reproduction method in determining the value of said lands (Id. 450), and to the result thereof the appellants excepted, and in stating and sustaining the exception this court, speaking through Mr. Justice Hughes, said:

"It is contended that the valuation was made upon a wrong theory; that it is a speculative estimate of 'cost of production'; that it is largely in excess of the market value of adjacent or similarly situated property; that it does not represent the present value, in any true sense, but constitutes a conjecture as to the amount which the railway company would have to pay to acquire its right of way, yards, and terminals, on an assumption, itself inadmissible, that, while the railroad did not exist, all other conditions, with respect to the agricultural and industrial development of the State and the location, population, and activities of towns, villages, and cities, were as they are now. (Id. p. 444.)

* * * * * * *

"It is at once apparent that, so far as the estimate rests upon a supposed compulsory feature of the acquisition, it can not be sustained. It is said that the company would be compelled to pay more than what is the normal market value of property in transactions between private parties; that it would lack the freedom they enjoy, and, in view of its needs, it would have to give a higher price. It is also said that this price would be in excess of the present market values of contiguous or similarly situated property. It might well be asked, who shall describe the conditions that would exist, or the exigencies of the hypothetical owners of the property, on the assumption that the railroad were removed? But, aside from this, it is impossible to assume, in making a judicial finding of what it would cost to acquire the property, that the company would be compelled to pay more than its fair market value. It is equipped with the governmental power of eminent domain. In view of its public purpose, it has been granted this privilege in order to prevent advantage being taken of its necessities. It would be free to stand upon its legal rights and it can not be supposed that they would be disregarded. (Id. 450–451.)

* * * * * * *

"Moreover, it is manifest that an attempt to estimate what would be the actual cost of acquiring the right of way, if the railroad were not there, is to indulge in mere speculation. The railroad has long been established; to it have been linked the activities of agriculture, industry, and trade. Communities have long been dependent upon its service, and their growth and development have been conditioned upon the facilities it has provided. The uses of property in the communities which it serves are to a large degree determined by it. The values of property along its line largely depend upon its existence. It is an integral part of the communal life. The assumption of its nonexistence, and at the same time that the values that rest upon it remain unchanged, is impossible and can not be entertained. The conditions of ownership of the property and the amounts which would have to be paid in acquiring the right of way, supposing the railroad to be removed, are wholly beyond reach of any process of rational determination. The cost-of-reproduction method is of service in ascertaining the present value of the plant, when it is reasonably applied and when the cost of reproducing the property may be ascertained with a proper degree of certainty. But it does not justify the acceptance of results which depend upon mere conjecture. (Id. 452.)

* * * * * * *

"The evidence in these cases demonstrates that the appraisements of the St. Paul and Minneapolis properties which were accepted by the master were in substance appraisals of what was considered to be the peculiar value of the railroad right of way. Efforts to express the results in the terms of a theory of cost of reproduction fail, as naturally they must, to alter or obscure the essential character of the work undertaken and performed. Presented with an impossible hypothesis and endeavoring to conform to it, the appraisers—men of ability and experience—were manifestly seeking to give their best judgment as to what the railroad right of way was worth. And doubtless it was believed that it might cost even more to acquire the property if one attempted to buy into the cities as they now exist and all the difficulties that might be imagined as incident to such a 'reproduction' were considered. The railroad right of way was conceived to be a property sui generis, 'a large body of land in a continuous ownership,' representing one of the 'highest uses' of property and possessing an exceptional value. The estimates before us, as approved by the master, with his increase of 25 per cent in the case of the Duluth property, must be taken to be estimates of the 'railway value' of the land; and whether or not this is conceived of as paid to other owners upon a hypothetical reacquisition of the property is not controlling when we come to the substantial question to be decided.

"That question is whether, in determining the fair present value of the property of the railroad company as a basis of its charges to the public it is entitled to a valuation of its right of way not only in excess of the amount invested in it, but also in excess of the market value of contiguous and similarly situated property. (Id. 453.)

• • • • • • •

"Assuming that the company is entitled to a reasonable share in the general prosperity of the communities which it serves, and thus to attribute to its property an increase in value, still the increase so allowed, apart from any improvements it may make, can not properly extend beyond the fair average of the normal market value of land in the vicinity having a similar character. Otherwise we enter the realm of mere conjecture. We therefore hold that it was error to base the estimates of value of the right of way, yards, and terminals upon the so-called 'railway value' of the property. The company would certainly have no ground of complaint if it were allowed a value for these lands equal to the fair average market value of similar lands in the vicinity, without additions by the use of multipliers, or otherwise, to cover hypothetical outlays. The allowances made below for a conjectural cost of acquisition and consequential damages must be disapproved; and, in this view, we also think it was error to add to the amount taken as the present value of the lands the further sums, calculated on that value, which were embraced in the item of 'engineering, superintendence, legal expenses,' 'contingencies,' and 'interest during construction.'" (Id. 455.)

It will be observed that this court entertained the opinion that an estimate of the present cost of acquisition of the lands included in the right of way, yards, and terminals of a carrier could be made only upon the theory that the railroad of the carrier would be removed before the estimate would be made, and it is apparent that no other theory would be tenable. The court points out that upon the assumption of the nonexistence of the railroad it is impossible for anyone to describe either the conditions that would exist or the exigencies of the hypothetical owners of the property, and says in emphatic language that an attempt to estimate what would be the actual cost of acquiring the right of way under such circumstances would be to indulge in mere speculation. In other words, this court says that what appellant is asking the court to require the commission to do can not, as a matter of law, be done. The court, however, does not stop here. It proceeds to demonstrate why such an estimate can not be made. It shows that the uses and values of lands in the vicinity of the railroad are largeley the result of the construction and operation of the railroad; that it would be impossible to determine the extent to which such uses and values have been so influenced, and that to assume that they would not be affected if the railroad were removed, and base upon that theory an estimate of reacquiring the lands, or its equivalent, an estimate of the present cost of condemnation and damages or of purchase, would be improper and unjustifiable and produce a result which could not be accepted as evidence by a court.

This court clearly states in substance that the estimate of present cost of condemnation and damages or of purchase which appellant is asking the court

to compel the commission to make is an estimate which is wholly beyond reach of any process of rational determination. In this connection it points out that the appraisers of the lands involved in the Minnesota Rate cases, in an attempt to estimate the cost of acquiring the lands, were presented with an impossible hypothesis.

As shown in the answer herein, the evidence introduced before the commission in connection with the valuation of the lands included in appellant's railroad establishes that at the time the railroad was constructed a portion of said lands was donated to and another portion purchased by appellant, and that appellant obtained title to still another portion through condemnation proceedings. It is evident that upon the assumption of the removal of the railroad and its reproduction it is impossible to ascertain the portion of said lands which would be so donated or the portion thereof which would have to be purchased by appellant, or the portion thereof appellant would have to acquire title to through condemnation proceedings.

It is further apparent that the removal of the railroad and its immediate reproduction would not damage in any manner or to any extent any of the lands adjoining or adjacent to the railroad or the owners of such adjoining or adjacent lands.

It is also clear that to determine upon the assumption of the removal of the railroad that the title to the lands included therein would revert to or be vested in the owners of said adjoining lands would be unjustifiable and improper. In this connection the commission states by way of illustration that chapter 8 of article 6532 of the statute laws of the State of Texas, which is the law in force at the present time in that State, provides as follows:

"The right of way secured or to be secured to any railway company in this State in the manner provided by law shall not be so construed as to include the fee simple estate in lands, either public or private, nor shall the same be lost by the forfeiture or expiration of the charter, but shall remain subject to an extension of the charter or the grant of a new charter over the same way without a new condemnation."

II. The word "estimate" is erroneously applied to an opinion expressed which has no reasonable foundation upon which to rest.

It is said that the contention that it is impossible to estimate the present cost of condemnation and damages or of purchase is unsound; that such estimates have been made in the past, and that what has been done once may be done again. This court, however, has demonstrated in the Minnesota Rate cases, supra, that the so-called estimates were not estimates in fact within a proper definition of that term, because they had no reasonable foundation upon which to rest. It expressed the view that before such an estimate could be made the railroad, in imagination at least, must be removed, and pointed out the unreasonableness of assuming that if such removal should take place no changes in the values now existing would result. In this connection it said:

"It might well be asked, who shall describe the conditions that would exist or the exigencies of the hypothetical owners of the property on the assumption that the railroad were removed?" (Id., 451.)

III. The court will not, by issuing a writ of mandamus, require something to be done which it is impossible to do.

It is further contended that the language in said paragraph entitled "Second" of the valuation act shows that Congress intended to require the commission to ascertain and report separately the present cost of condemnation and damages or of purchase, and that for this reason it must attempt to do so. In this connection, however, we do not deem it necessary to make a lengthy argument, because a well-known maxim is that the law never requires the impossible.

In Silsby Manufacturing Co. v. City of Allentown (26 Atl., 646) it was held that "The requirement that proposals to furnish a city with materials needed shall be advertised for need not be complied with where the thing needed is part of a patented article which can be bought at only one place." In support of this holding the court said: "The law does not insist on what is impossible or absolutely useless."

If the court reaches the conclusion that on account of matters herein set forth it would be impossible to discover any lawful or reasonable basis upon which to rest an estimate of the present cost of condemnation and damages or of purchase of the lands included in appellant's railroad it will not issue a writ of mandamus in accordance with appellant's request.

IV. The meaning of paragraph entitled "Second" of the valuation act is not entirely clear.

Thus far we have been discussing matters herein upon the assumption that the meaning of paragraph entitled "Second" of the valuation act is clear, but we are obliged to admit that this might reasonably be regarded as a violent assumption.

It has been said that the latter portion of this paragraph calls for the original and present costs of acquisition, exclusive of the value of the land taken at the time of its acquisition by the carrier; but, on the other hand, it has been argued that the acquisition costs called for include the value of the land taken.

It is also contended that in its language in the Minnesota Rate cases above quoted this court was speaking of the present cost of acquisition, including the value of the land taken, and not of the present cost of acquisition exclusive of such value.

According to our view, however, these differences as to interpretation are of no importance whatever. The matter of consequence in this connection is that this court expressed the view that an estimate of the present cost of acquisition could be made only by indulging in mere speculation, and, with this as a premise, held that an estimate so made could not properly be used in determining the fair present value of the carrier's lands.

V. The decision of this court in the Minnesota Rate cases is directly in point and should be given controlling influence.

Notwithstanding the plain language used by this court in its decision in the Minnesota Rate cases, it has been contended that the decision has no application in a case of this kind, because it was rendered in a case where the fair average of the normal market value of lands similar to the lands included in the rights of way, yards, and terminals of the carriers had not been shown.

In some instances this argument would perhaps have force, but in this instance there is no necessity for resorting to inference in order to determine what the court intended to, and did, decide. As above shown, in advance of announcing its decision, the court stated the question it intended to decide, and then decided that question in plain and unambiguous language. Also it will be seen that the court represented that question to be the substantial question presented for determination, which, of course, it was.

A contention exactly like the contention of counsel for the carriers, above mentioned, was made in the case of Chicago & North Western Railway Co. v. Smith (210 Fed., 632), decided on January 20, 1914. Up to the time of final hearing in the Chicago & North Western case, both parties—that is, the State of South Dakota and representatives of the carrier—had proceeded upon the theory that it was proper to attempt to estimate the present cost of acquisition of the carrier's lands and use that estimate in determining the fair present value of the lands, but on final hearing the State objected to the estimate and such use thereof upon the ground that the decision of this court in the Minnesota Rate cases had shown the making and use of the estimate to be improper. In sustaining the contention of the State in this regard, the court, speaking through District Judge Willard, and after reviewing the pertinent evidence, said:

"From this evidence the company argues that it is unfair to say that for a strip of land 100 feet wide through the middle of a 160-acre farm it should be allowed no more as the cost of reproducing it than the price per acre if the whole farm were to be bought; that it is a matter of common knowledge that, if a private individual wanted to buy such a strip, it would cost him much more per acre than the value per acre of the whole farm.

"It is true that the evidence in this case does differ from that in the Minnesota Rate cases, and there is much force in the company's argument. But the defendant's claim in this respect is disposed of by what the Supreme Court in the Minnesota Rate cases (220 U. S., on p. 455; 33 Sup. Ct., on p. 763; 57 L. Ed., 1511) said:

"'The company would certainly have no ground of complaint if it were allowed a value for these lands equal to the fair average market value of similar land in the vicinity, without additions by the use of multipliers, or otherwise, to cover hypothetical outlays. The allowances made below for a conjectural cost of acquisition and consequential damages must be disapproved; and, in this view, we also think it was error to add to the amount taken as the present value of the lands the further sums, calculated on that value, which were embraced in the items of "engineering, superintendence, legal expenses," "contingencies," and "interest during construction."'

"I, accordingly, adopt the valuation placed upon these lands by the State before any multiplier is used, * * *." (Id. 639.)

In pointing out the difference concerning evidence of market value in the Minnesota Rate cases, on the one hand, as compared with the Chicago & North Western case on the other, statements of District Judge Willard were as follows:

"* * * Nowhere in that case did the market value of contiguous lands appear. That does appear in this case, both in the evidence of the State and in that of the company." (Id. 638.)

To the same effect see L. & N. R. Co. *v.* Railroad Commission of Alabama (208 Fed., 35, 42–44) and Ann Arbor R. Co. *v.* Fellows et al. (236 Fed., 387, 392). In the latter case, the court, speaking through Sessions, district judge, said:

"* * * The valuation placed upon the right of way and station grounds, exclusive of all improvements thereon, is $397,104, to which sum has been added more than 14 per cent thereof for so-called 'overheads.' This basic valuation has been reached by applying to the right of way without improvements the estimated values of adjacent lands, including all buildings and other improvements. It is sufficient to say that this method of computing values and the practice of adding 'overheads' to actual values are contrary to the letter and the spirit of the rule laid down by the Supreme Court in the Minnesota Rate cases (230 U. S., 352) * * *."

In its decision in the Texas Midland case, supra, the commission shows several instances where State authorities have placed a like interpretation upon the decision of this court in the Minnesota Rate cases and have refused to apply the cost-of-reproduction method in determining the value of lands used by common-carrier corporations in serving the general public. (Id., 61.)

VI. This court has approved the commission's interpretation of the court's decision in the Minnesota Rate cases.

In the case of City and County of Denver *v.* The Denver Union Water Co. (246 U. S., 178), this court had occasion to, and did, pass upon and approve an interpretation of its decision in the Minnesota Rate cases which had been made by a special master and approved by the District Court for the District of Colorado. In this connection the master said:

"The measure of value of lands adopted in considering the evidence is the present normal market value of similar lands in the same locality. (Minnesota Rate cases, 230 U. S., 352, at 449–456.) It follows from this rule that the original cost of the lands is not necessarily the controlling factor, though such original cost has been considered along with all the other evidence in determining the value. It likewise follows from this measure of value that when the present normal market value of similar lands in the same locality has been determined, nothing can be added to such value on account of the actual or estimated consequential or severance damages—if any—paid by the water company when it originally acquired its lands or on account of the company's actual or estimated overhead expenses in connection with the purchase of these lands. These expenses represent original costs of the lands and not their present market value. In considering the evidence concerning the value of these lands I have assumed that we may take into consideration their adaptability or availability for any useful purpose, provided the evidence shows that lands possessing such adaptability or availability have any special market value on account thereof; but the final question, in my judgment, always is, What is the present market value of similar lands in the same locality, and not what are these lands worth now to the water company for the purposes for which they are now used?" (Texas Midland case, supra, p. 60.)

After reviewing several matters involved in the case this court, speaking through Mr. Justice Pitney, announced its conclusion concerning the special master's aforesaid interpretation of its decision in the Minnesota Rate cases. In this connection the court said:

"What we have said establishes the propriety of estimating complainant's property on the basis of present market values as to land and reproduction cost, less depreciation, as to structures." (Id., 191.)

The method of procedure adopted and followed by the commission in determining the present value of lands included in the rights of way, yards, and terminals of common carriers is described by it in its decision in said Texas Midland case as follows:

"Present value * * * is arrived at by ascertaining the number of acres of land owned or used by the carrier for its purposes as a common carrier and

multiplying this acreage by a market value determined from the present market value of similar adjacent and adjoining lands. Due allowance is made for any peculiar value which may attach by reason of the peculiar adaptability of the land to railroad use.

"Nothing is included for the expense of acquisition, nor for severance damages, nor for interest during construction." (Id., 53.)

It will be observed that the commission is acting in accordance with the decision of this court in the Minnesota Rate cases as interpreted by the court itself in the Denver Union Water Co. case, and if the commission should act instead in accordance with the method of procedure appellant is asking this court to compel it to pursue it would commit thereby an error of law. If the commission should make estimates of the present cost of condemnation and damages or of purchase of appellant's common-carrier lands, notwithstanding that no reasonable or lawful basis upon which to rest such estimates can be discovered, and then consider and give weight to the estimates in determining the value of appellant's property for rate-making purposes, it would necessarily result that the value thus fixed could not be sustained in court.

VII. Appellant's contention that the commission may properly base estimates of present cost of condemnation and damages or of purchase upon the present market value of the lands involved, as estimated by the commission, is unsound.

Appellant says it has accepted the estimate of the present market value of its lands made by the commission, and that therefore the commission, using this estimate as a basis, can easily find the present cost of condemnation and damages or of purchase.

The unsoundness of this proposition, however, is readily observable. In finding the present market value of appellant's common-carrier lands, as measured by the "fair average of the normal market value of lands in the vicinity having a similar character," the commission must, of course, consider conditions as they now are, including the existence of the railroad, but in estimating what it would cost to reacquire such lands—that is, the reproduction cost, or the present cost of condemnation and damages or of purchase of the lands—the commission would have to treat the railroad as nonexistent and speculate, enter into the realm of mere conjecture, as to what the market value of the lands would be under such circumstances. This is necessarily true, first, because it is impossible to reproduce a thing which is in existence and, second, because it would be improper for the commission to assume the nonexistence of the railroad and "at the same time that the values that rest upon it remain unchanged," as stated by this court, as above shown in the Minnesota Rate cases. It is also true, as stated by this court in said cases, that an attempt to estimate what would be the conditions of ownership of said lands or the exigencies of the hypothetical owners thereof upon the assumption that the railroad were removed would be an attempt to accomplish the impossible.

VIII. Appellant's contention that it will lose something to which it is entitled, unless the remedy it asks for is applied, is based upon speculation and is not justified by the facts.

For the purpose evidently of indicating that its rights have not been properly protected appellant avers that it paid $180,000 for lands the present market value of which as estimated by the commission is only $60,000, and that the cost of reproducing its lands and those of its associated companies would be more than twice as much as the sum the commission has included as their present value in its tentative valuation. When we compare these averments with appellant's assertion that it has accepted the present market value of its lands as estimated by the commission it is apparent that the injury appellant is talking about is based upon its belief that when the commission fixes the ultimate value of its properties for rate-making purposes, or for some other purpose, it will include therein as the value of appellant's lands only their present value as measured by the fair average of the normal market value of similar lands in the same vicinity. This belief, however, is necessarily based upon speculation and is not justified by the facts, because it is simply appellant's conjecture concerning action to be taken by the commission, if taken at all, in the future. Up to the present time the commission has not fixed for any purpose the ultimate value of appellant's common-carrier property, or the ultimate value of any other common-carrier property, and when it does so it will of course have to consider and give proper weight to, not only the present value of the lands as measured by the fair average of the normal market

value of lands in the vicinity having a similar character, but also the amount of money paid by the carrier for the lands and all other pertinent facts and circumstances. In Smyth *v.* Ames (169 U. S., 466), in announcing its conclusion concerning the matters to be considered in fixing an ultimate value for rate-making purposes this court, speaking through Mr. Justice Harlan, said:

"We hold, however, that the basis of all calculations as to the reasonableness of rates to be charged by a corporation maintaining a highway under legislative sanction must be the fair value of the property being used by it for the convenience of the public. And in order to ascertain that value, the original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stock, the present as compared with the original cost of construction, the probable earning capacity of the property under particular rates prescribed by statute, and the sum required to meet operating expenses, are all matters for consideration, and are to be given such weight as may be just and right in each case. * * *" (Id., 546–547.)

Appellant does not aver, and it could not truthfully aver, that the commission has refused to permit it to show the amount of the investment made in its common-carrier lands when they were acquired and dedicated to the service of the public, and while it avers that it paid $180,000 for lands the present market value of which was estimated by the commission as only $60,000, it carefully refrains from comparing the total investment made in all its common-carrier lands with their present value, as measured by the fair average of the normal market value of lands in the vicinity having a similar character. If in the future the commission fixes, for a particular purpose, the ultimate value of appellant's common-carrier properties and includes therein as the value of its lands less than the amount invested in the lands at the time they were acquired and dedicated to the service of the public, appellant will be free to challenge the validity of the commission's action, but we respectfully submit that until that time arrives it will have no standing in court in a case like the one now under consideration.

In its brief in this case in the court of appeals appellant said: "Neither the effect of the land reproduction schedule when once ascertained nor the use to be made of it can be considered by the court in this proceeding."

If these assertions of appellant are correct, it necessarily follows, we submit, that the court can not comply with appellant's request for a writ of mandamus; because, if appellant is unable to show that it will sustain a legal injury if the writ is not issued, it can not establish its right thereto, and it goes without saying that unless the court may consider the effect of the land reproduction schedule and the use to be made thereof, it can not determine whether such an injury will result from the commission's refusal to receive and consider the evidence, so called, which is in question here.

IX. Appellant is asking the court to assist it in obtaining for its common-carrier lands a special railway value, in excess of the amount invested in them and beyond the value of similar property owned by others.

Notwithstanding its admission that the commission has correctly estimated the present value of its common-carrier lands, as measured by the fair average of the normal market value of similar lands in the same vicinity, and without attempting to show that this value is less than the amount of money invested in the lands when they were acquired and dedicated to the service of the public, appellant is trying to induce the court to assist it in securing a greater value by compelling the commission to use, in valuing the lands, what is known as the cost-of-reproduction method. The mental route traveled by the commission in reaching conclusions concerning values of lands is the same regardless of the purpose for which the lands are used, but while appellant is contending that the commission should us the cost-of-production method in valuing its common-carrier lands it does not advance a like claim concerning lands owned by it and used for purposes other than those of a common carrier. This means, if it means anything, that appellant is contending it is entitled to a special railway value, that is, a value of its common-carrier lands in excess of the amount invested in them and beyond the value of similar property owned by others, solely by reason of the fact that they are used in the public service.

In this regard the method of procedure appellant is endeavoring to compel the commission to adopt and follow is exactly like the procedure of the circuit court, which was condemned by this court, in the Minnesota Rate cases, supra, where pertinent language of the court was as follows:

"The evidence in these cases demonstrates that the appraisements of the St. Paul and Minneapolis properties which were accepted by the master were

in substance appraisals of what was considered to be the peculiar value of the railroad right of way. Efforts to express the results in the terms of a theory of cost of reproduction fail, as naturally they must, to alter or obscure the essential character of the work undertaken and performed. Presented with an impossible hypothesis, and endeavoring to conform to it, the appraisers—men of ability and experience—were manifestly seeking to give their best judgment as to what the railroad right of way was worth. And doubtless it was believed that it might cost even more to acquire the property, if one attempted to buy into the cities as they now exist and all the difficulties that might be imagined as incident to such a 'reproduction' were considered. The railroad right of way was conceived to be a property sui generis, 'a large body of land in a continuous ownership,' representing one of the 'highest uses' of property and possessing an exceptional value. The estimates before us, as approved by the master, with his increase of 25 per cent in the case of the Duluth property, must be taken to be estimates of the 'railway value' of the land.

* * * * * * *

"And where the inquiry is as to the fair value of the property, in order to determine the reasonableness of the return allowed by the rate-making power, it is not admissible to attribute to the property owned by the carriers a speculative increment of value over the amount invested in it and beyond the value of similar property owned by others solely by reason of the fact that it is used in the public service. That would be to disregard the essential conditions of the public use and to make the public use destructive of the public right.

"The increase sought for 'railway value' in these cases is an increment over all outlays of the carrier and over the values of similar land in the vicinity. It is an increment which can not be referred to any known criterion, but must rest on a mere expression of judgment, which finds no proper test or standard in the transactions of the business world. It is an increment which in the last analysis must rest on an estimate of the value of the railroad use as compared with other business uses; it involves an appreciation of the returns from rates (when rates themselves are in dispute) and a sweeping generalization embracing substantially all the activities of the community. For an allowance of this character there is no warrant." (Id., 453, 454–455.)

X. Appellant misconstrues the paragraph of the valuation act with which it is asking the court to compel the commission to comply.

Appellant's brief in this case in the court of appeals contains a paragraph which reads: "That certain of relator's lands were acquired by donation presents no difficulty in the way of ascertaining their present cost of condemnation and damages or of purchase." In support of this conclusion appellant pointed out that, as to structures, the commission estimates the cost of reproduction regardless of the fact that some of them were donated to the carriers originally, and then said: "But two questions are presented: First, what lands, rights of way, and terminals did the relator own or use for the purpose of common carrier, and, secondly, what is the present cost of condemnation and damages or of purchase of those lands? The provision is not ambiguous. There is no room for speculation or conjecture as to what lands are involved, because the requirement of the statute operates upon all lands, whether originally acquired by purchase or condemnation or gift or by operation of the statute of limitations, or in any other conceivable manner."

It is true that the commission estimates the cost of reproducing common-carrier structures, but this can be done, because the market prices to be paid for the materials which enter into the structures do not depend upon the places in which the structures are to be located or upon the circumstances and conditions surrounding such places. In attempting to estimate the cost of reproducing common-carrier lands, however, the estimator is immediately confronted with difficulties which are insurmountable. Of course the lands could not be reproduced, and in order to estimate what it would cost to reacquire them it would be necessary to know what the conditions of their ownership and the exigencies of their owners would be if the railroad were not there, and, as stated by this court in the Minnesota Rate cases, supra, neither of said elements is capable of rational ascertainment. The pertinent language of the court was:

"* * * It might well be asked, who shall describe the conditions that would exist, or the exigencies of the hypothetical owners of the property, on the assumption that the railroad were removed? * * *. (Id., 451.)

"* * * The assumption of its nonexistence, and at the same time that the values that rest upon it remain unchanged, is impossible and can not be

entertained. The conditions of ownership of the property and the amounts which would have to be paid in acquiring the right of way, supposing the railroad to be removed, are wholly beyond reach of any process of rational determination. * * *." (Id., 452.)

But even if it could overcome these difficulties, the commission would still find it impossible to make the estimates in question. It will be observed that in and by the first part of said paragraph entitled "Second" the commission is required to find the original cost and present value of common-carrier lands, and that having done this it is required by the latter portion of the paragraph to state in detail the present cost "of condemnation and damages or of purchase in excess of such original cost or present value." This is not a call for the present costs of acquisition in the aggregate; it is instead a call for the present costs of condemnation and damages in one sum and the present costs of purchase in another sum, and in order to determine either of said sums it would be necessary to know how much of the land would be donated to the carrier, how much it would have to purchase, and the portion thereof it would have to acquire through condemnation proceedings. To the extent that donations were made it would be unnecessary for the carrier to prosecute condemnation proceedings and make purchases, and no one will claim that, especially where the sum paid for the land itself is not included, the cost of acquiring it by purchase is as great as, or even approximates, the cost of obtaining title to it through condemnation proceedings.

It is a matter of common knowledge that when the railroads of this country were constructed a very large portion of the lands included in the rights of way, yards, and terminals thereof was donated to the carriers, and that only a comparatively small portion of said lands was acquired by the carriers through condemnation proceedings. Under these circumstances, and for the reason that if a person were compelled to speculate as to what would happen in the future he would naturally resort to a study of what had happened in the past, we think appellant's contentions that, for the purpose of estimating the cost of reproducing the railroads, it would be proper and lawful to assume that, at the time of reproduction, the lands included therein would be worth as much per acre as they are at the present time; that they would be owned by parties other than the carriers, and that the latter would have to obtain title to them in every instance through condemnation proceedings prosecuted against such owners, are clearly unsound.

The speculative costs appellant is endeavoring to secure the advantage of are costs it never did incur and never will, because no stretch of the imagination is sufficient to justify the conclusion that such costs can ever be incurred by anybody. Nevertheless, appellant insists that unless it is accorded such an advantage, and the commission is compelled to make the estimates in question and use them in valuing appellant's property, its rights under the Constitution of the United States will be violated.

On the contrary, however, we respectfully submit that such an advantage could not be accorded to the appellant and other common carriers without depriving those who pay for common-carrier services of the right to have the charges therefor based upon the fair value of the property used by the carriers in performing the services. In other words, the advantage appellant is contending for would, if granted, constitute a legal and unconscionable injury to the general public.

XI. The real difficulty.

In said brief in the court of appeals, under the heading of "The real difficulty," appellant indulged in considerable speculation concerning the reasons which prompted the commission to deny it the advantage it is endeavoring to obtain, and expressed the view that one reason for such denial was the conviction of the commission that, in requiring it to ascertain and report separately the "present cost of condemnation and damages or of purchase" of common carrier lands, Congress acted unwisely.

Of course the commission repudiates the intimation that it has in this case based, or that it ever bases, action taken by it upon its opinion concerning the wisdom of Congress as manifested by the provisions of any law it may enact.

In this connection, however, the commission states: That the valuation act was passed on March 1, 1913; that the decision of this court in the Minnesota Rate cases was handed down and made public on June 9, 1913; that prior to said June 9 the lower courts and some of the State commissions had proceeded

upon the theory that it was proper to attempt to apply the cost-of-production method in determining the present value of common-carrier lands, and that while said theory was being advanced and acted upon favorably, and before the unsoundness of that theory had been demonstrated by this court, Congress inserted in said act the requirement here in question.

Under these circumstances it seems reasonable to believe, and the commission does believe, that if the publication of said decision had preceded the passage of the valuation act said requirement would never have existed, because it feels certain Congress would have endeavored to act in accordance with the principles of law as announced by the court of last resort.

The action of the commission complained of by appellant, however, is not based upon this belief, but is based instead upon the commission's conviction that compliance with said requirement is, as a matter of law, impossible.

For the reasons above set forth we respectfully submit that the appeal in this case should be dismissed.

P. J. FARRELL,
For Defendant in Error.

The CHAIRMAN. We will now adjourn until 11 o'clock to-morrow.

(Whereupon, at 11.55 o'clock a. m., an adjournment was taken until 11 o'clock a. m., June 11, 1921.)

VALUATION OF RAILROAD LANDS.

SATURDAY, JUNE 11, 1921.

UNITED STATES SENATE,
COMMITTEE ON INTERSTATE COMMERCE,
Washington, D. C.

The committee met, pursuant to adjournment of yesterday, at 11 o'clock a. m., Hon. Albert B. Cummins (chairman) presiding.

Present: Senators Cummins (chairman), McLean, and Stanley.

The CHAIRMAN. It seems to be impossible to get any considerable number of the committee here, but I have done the best I could. We will proceed. Have you finished, Mr. Farrell?

Mr. FARRELL. I want to say, Mr. Chairman, that since my brief was made a part of the record by the committee yesterday it does not seem to me necessary to make any further remarks, unless members of the committee should care to make inquiries.

The CHAIRMAN. Mr. Benton, you may proceed.

STATEMENT OF MR. JOHN E. BENTON, GENERAL SOLICITOR, NATIONAL ASSOCIATION OF RAILWAY AND UTILITIES COMMISSIONERS, WASHINGTON, D. C.

Mr. BENTON. Mr. Chairman, I never listen to discussion of any controverted question by my friends on the other side, Judge Brantley and Judge Moore, without being impressed with a sense of amazement and unwilling admiration at the genius which they show for confusing the situation by the mere utterance of fair-sounding words.

I want to read a certain part of the subcommittee's report, which Judge Moore did not read. In that report the subcommittee quotes paragraph second of the act, as it will stand if this bill passes. It then says:

> It will be noted that the law, if so amended, will still require the commission to ascertain and report the present value of railroad lands, and in ascertaining that value it may use all lawful methods and include all proper elements.

If anything is clear, the absolute accuracy of that statement seems clear.

The men who composed the subcommittee, who made that report, are lawyers of very distinguished ability. The words I have read are a deliberately considered utterance intended by them for the guidance of their associates in the United States Senate upon a matter that had been committed to them for special investigation and consideration and recommendation. Under those circumstances nobody will lightly question the soundness of that statement as a statement of law.

Nevertheless, Judge Brantley opened the discussion yesterday by saying that the carriers do not desire more than the present value of their lands. The entire discussion from the other side consisted of an attempt to break down the statement of law which I have just read and to lead the committee to the conclusion that if this bill passes the carriers will be deprived of the consideration of some element of value to which they are lawfully entitled.

The gentlemen on the other side are also lawyers of very eminent ability, and certainly they do not take issue with the members of the subcommittee lightly. When they say that the passage of this bill will deprive the carriers of the consideration of a lawful element of value, notwithstanding the subcommittee's declaration on that point, they must justify their difference with the subcommittee by some process of reasoning. What is it? These men know very well what they are fighting for. I do not think they question at all seriously the accuracy of the subcommittee's statement, that if this bill passes the commission will still be required to consider all lawful elements of value. I think they recognize this as clearly as the committee does.

But they recognize, too, that the elements which would then be lawful would be only those which were lawful before the valuation act was passed. The commission would be free to apply the opinion laid down by the court in the Minnesota case, without consideration of the fictitious element of "present cost of condemnation and damages in excess of cost or present value." Before the valuation act was passed this guess, which is called an estimate, was not evidence. The Minnesota Rate case decided that. The valuation act made it evidence by virtue of the mandate of Congress therein contained. The Kansas City Southern case decided that. The only question is whether Congress will hold those words in the law, with the certain result of thereby immensely swelling railroad values beyond what they would otherwise be.

I can not discuss this bill helpfully unless I face facts as they are and state them without any quibbling. It is entirely misleading for gentlemen representing the carriers to argue, as they do, that the presence of those words in the statute can do no harm—that the commission can disregard the so-called estimate if it pleases. That argument appears to have impressed one Senator yesterday. It will not impress him when he considers it a moment. This is a question of evidence the commission is to consider in the fixing of final rate value of these properties.

The commission, for that purpose, is a jury. Is there any man who ever tried half a dozen cases who does not know that you can not put evidence before a jury which doubles the estimate of damages without prejudicing the result? And the commission's finding of value is not final. Within a year the Supreme Court has held that value can not be fixed finally for rate purposes except by the courts.

So the values the commission is now fixing will hereafter come up from time to time to be reviewed in the lower Federal courts. Is there any lawyer who believes that this estimate will be harmless to the public interest if the law stands as it is now? It will stand before the court as an estimate commanded by Congress to be made, made lawful evidence by act of Congress, in a statute confirmed

by a judgment of the highest court. I refer to the Kansas City Southern judgment, where the court said that Congress could impose its will as to the way and manner in which these values should be determined, and that the commission was a mere agency of Congress and must follow the direction of Congress, anything in the Minnesota rate case opinion to the contrary notwithstanding. The infirmities of the estimate, so well known to the commission, which stands before Congress, asking Congress to relieve it from poisoning its work with this conjectural, misleading, and worse than worthless estimate, will be unknown to the court.

The words in the valuation act which this bill would remove operate in effect to create values which the railroads before did not possess.

The gentlemen on the other side will not admit this. They are driven to seek to confuse the issue and to create doubt as to what in fact was decided by the court in the Minnesota case, and to create the impression that the carriers may be unfairly treated if this bill is passed. Unless they can succeed in doing this, they know they can not expect action favorable to them at the hands of this committee.

I accordingly purpose to use what time I have in demonstrating, as I believe I can, that what the carriers are seeking to secure by holding this provision in the law they would not be entitled to under the Minnesota Rate cases decision. If I do that, I do not doubt what this committee will do, for I do not apprehend that it is disposed to create values by legislation, upon which the people of this country must pay returns in the way of rates.

The carriers now frankly claim that this multiplied value of real estate should be added into rate value. Everybody now understands that to be their claim, and knows that if they succeed in what they are seeking to accomplish it will more than double the value of railroad lands in this country.

In the Minnesota case the court denied the application of the multiple on two grounds: First, because the cost of acquisition of railroad lands, if the roads were nonexistent, is impossible of rational determination, and, second, because it would be unjust.

As to the first ground, nobody can add anything to what was said by your subcommittee and by the chief counsel of the commission. It is manifestly impossible.

But Senator Underwood said: "Why," in the case of reproduction, "is not the inquiry what a similar road alongside the existing road would cost? That would leave existing values undisturbed and the impossibility would disappear."

I want to point out that this suggestion is in effect completely answered by the Minnesota Rate cases opinion. The court said:

> The substantial question to be decided is whether, in determining the fair present value of the property of the railroad company * * * is its land * * * to be treated * * * not only as increasing in value by reason of the activities and general prosperity of the community, but as constantly outstripping in this increase all neighboring lands of like character devoted to other uses? * * * For an allowance of this character there is no warrant.

What the court condemned was not the enjoyment of increment but of an unjust increment, outstripping in its increase like lands devoted to other uses. Under the multiple method of valuation the

railroad land always outstrips in increment privately owned land. Let us assume a multiple of two: Land may have cost $20 per acre when other land was $10, or it may have been donated. When privately owned land goes to $50 the railroad goes to $100; when the privately owned land reaches $500 the railroad land has reached $1,000. That is what the court condemned.

Now, it is entirely obvious that if the railroad is to be valued as Senator Underwood suggests, by estimating the cost of building a duplicate line and allowing a multiplied present value on that theory, then the railroad will always be allowed this increment, constantly outstripping the increment enjoyed on privately owned land, which the court explicitly condemned.

The quoted language from the decision condemns the multiple method of land valuation, no matter upon what theory you seek to justify it, because when you use that method you unavoidably give to the railroad a multiplied increment which private owners do not enjoy. I point this out at every hearing. Judge Brantley has never replied.

He makes, however, a plausible pretense of doing so. He says what the court condemned in the Minnesota case was "railway value." I am glad he admits that much, for he admits away his whole case. This is demonstrable.

It is admitted by everybody that the present value at which railroad land is set down by the land appraisers in the commission's land report is the normal market value of similar adjoining lands devoted to other uses. But the carriers say that because they have this land in a strip suitable for railway use, they are entitled to have more than the market value for other uses applied to it. In other words, they are entitled to a "railway value."

I want to turn to the resolution which Judge Brantley put into this record as passed by the railway executives, and read from it only two or three lines for the purpose of illustrating this point. They say in that resolution:

> Whereas the enactment of this bill into law would result in the illegal denial to the carriers in the valuation of their properties of any value of their carrier lands other than the acreage value of other land adjacent and adjoining—

Which resolution shows that the railway executives were improperly advised as to the real way and manner in which the commission is valuing these lands, which was stated to you yesterday, and which is shown by the commission's reports. I continue to quote from the resolution—

> and which other lands are devoted to other and less valuable uses.

In other words, the claim is that because these lands are devoted to a railroad use they are entitled to more than the normal market value of similar adjoining lands devoted to other uses. Now, that is exactly what the court negatived, so far as it involves the allowance of a multiplied increment. The court did not condemn the allowance of necessary expenditures for the original acquisition in strip form. It condemned the multiplication of actual original costs through the device of an assumed reacquisition. I quote again from the Minnesota opinion:

> The evidence in these cases demonstrates that the appraisements * * * were in substance appraisals of what was considered to be the peculiar value of the railroad right of way * * *. And doubtless it was believed that it

might cost even more to acquire the property if one attempted to buy into cities as they now exist and all the difficulties that might be imagined as incident to such a "reproduction" were considered. The railroad right of way was conceived to be a property sui generis, "a large body of land in continuous ownership," representing one of the "highest uses" of property and possessing an exceptional value. The estimates before us * * * must be taken to be estimates of the railway value of the land, and whether or not this is conceived of as paid to other owners upon a hypothetical reacquisition of the property is not controlling when we come to the substantial question to be decided. * * * The increase sought for "railway value" in these cases is an increment over all outlays of the carrier and over the values of similar land in the vicinity. * * * For such an allowance there is no warrant.

Accordingly, in appraising the railroad lands on the basis of the "normal market value" of similar adjacent lands, as the commission does, it follows exactly the rule the court laid down. At the earlier hearing, and in Judge Moore's brief, the attempt was made to create the impression that injustice threatens the carrier in the shape of denial of allowance for necessary expenditures. That this is not true was made clear by Chief Counsel Farrell yesterday, who stated to you that the actual amount put into the final value found for the entire railroad property remains to be fixed when the commission comes to determine the final value of the entire railroad. It then has before it the acreage value, determined in the manner pointed out by the court in the Minnesota case. It has before it the report of the original cost of the carriers' right-of-way strip, and determines then what fairly and justly should be included. And I pointed out in a letter to the chairman an actual instance which demonstrates that where the original cost necessarily paid exceeds the value of similar adjacent lands it is the necessary investment that governs in making the allowance for land in making the final valuation.

Up until the Kansas City Southern court decision, therefore, the commission was scrupulously following the Minnesota Rate opinion. The Supreme Court did not condemn the allowance of necessary expenditures in acquiring railroad right of way. In words which I have already quoted, it said:

> The substantial question to be decided * * * is whether, in determining the fair present value, * * * the railroad company * * * is entitled to a valuation of its right of way not only in excess of the amount invested in it but also in excess of the market value of contiguous and similarly situated property.

So that the rule of law laid down by the United States Supreme Court, which the commission believes to be right, and will follow if Congress will permit, will give to the carriers what they paid for their lands, and will give them any increase above that amount which is enjoyed by similar lands not devoted to railway use.

Ought this rule to be changed by legislative act? On this point the subcommittee said:

> It would be outrageously unjust to find a value largely contributed by the existence of the railroad and then multiply that value by 2, 3, or 4 because a right-of-way strip would cost more per acre than the adjacent land is worth per acre.

Nevertheless, this course, which your subcommittee has said would be outrageously unjust, is exactly what the commission finds itself compelled to do by the act of Congress which this bill would amend.

Senator STANLEY. Let me ask you a question right there. In estimating the original cost of the land do not the books of the com-

pany show, in cases of actual condemnation, the amount paid pursuant to the judgment of the court, just as they would show the amount paid in the case of lands acquired without condemnation? Is that true?

Mr. BENTON. Yes, sir.

Senator STANLEY. Then all the cost to which they would be put by actual condemnation proceedings is taken into consideration and is included in the calculation without this provision in the law?

Mr. BENTON. Yes, Senator; and the incidental costs of acquisition are also very carefully investigated and reported, and they are in the valuation data before the commission and considered by it.

I want at this point also to make an observation relating to a suggestion made by the chairman yesterday, who seemed to be under the impression that it was a common thing that the commission was unable to get the original cost of land. There are some instances in which that is true, but in the great majority of cases the original cost is found, and with substantial accuracy.

I think it is proper for me to say that the commission calls upon the carriers to make to it a statement of their original cost for lands, and if examination is made of the tables which follow my statement in the House hearing on the bill H. R. 13997 there will be found listed 150 roads, being all of those which had advanced to a particular stage of completion, taken without exception, and it will be seen that in practically all of those the original cost has been ascertained. It will also be seen that the present value reported there vastly exceeds in the aggregate the amount of the original cost, and in practically all cases. There are some exceptions where the original cost exceeds the present value as they have reported it. I have already pointed out, however, that that original cost is considered and allowed for when the commission comes to fix the final value.

I may observe that I think what the chairman probably had in mind was the failure of the commission to find the original cost to date of the property which is covered by the engineering report; that is, the roadbed, the track, and the structures. As to that there has been an almost compiete failure to make report.

The State commissions that I represent have from the first urged the commission to make that report. The commission has reported that it can not do it, and it is not doing it. I am not stating that for the purpose of criticizing them, but I think that is what the chairman probably had in mind. There has been at one time or another more or less comment upon that. My firm belief is that it is most unfortunate that that figure can not be discovered. It is unfortunate the carriers have not kept their records in such shape that the commission feels it can do it; because I am firmly of the belief that the reproduction costs of these properties, with the allowances which the engineers claim it is proper to make and which are always made in figuring cost of reproduction, do very largely overstate what the property actually cost to produce as of the date when those are applied.

The CHAIRMAN. What you have just mentioned is one of the considerations that I had in mind, but the other is the transition of this property from one company to another through foreclosures, through requisitions, and in a great variety of ways. Now, what is the

original cost of property that was constructed, acquired 50 years ago, but which 10 years after that time or 20 years after that time was sold to an entirely independent company, so that we are dealing now with the successor of that original owner of the property?

Mr. BENTON. As the commission does the work, all of that information is before it when it comes to fix the final value, if the records disclose it. In other words, the original cost of that land when originally acquired, all of the transactions whereby it has passed from carrier to carrier, and the investments of the present owner.

The CHAIRMAN. I understand that they are not attempting to find, for instance, what it cost the company which now owns the property.

Mr. BENTON. That is true and that is not true. It is true that it is not tabulated as land costs. It is true that the act called for a settlement of the financial transactions of the carrier, its issues of stock and all expenditures of money, and that in the case of consolidations, where property passes from carrier to carrrier, the accountants of the commission make elaborate report as to the transaction and as to the payments for the properties acquired.

Mr. BRANTLEY. May I ask this question: Would it not be true if this bill becomes a law that so far as the law is concerned the only original cost of land that the commmission will be required to report will be the original cost of land as of the date of the dedication of that land to public use?

Mr. BENTON. It is accurate that the law will then require the original cost of that land, ascertained as of the date of public use; that it will require the report of the present value of the same, which, as your subcommittee has pointed out, means the full present value, taking into consideration every lawful element; and the law will also specifically require the commission to report concerning all issues of securities and expenditures of money by the carrier, which will necessarily involve every such transaction as you have referred to.

Now, I would like to turn to what I was about to read from the commission's own statement of the way it makes this so-called estimate of present cost of condemnation and damages in excess of original cost or present value. This statement shows that the commission, by the act of Congress and by the necessity of doing what the court has commanded it to do, is compelled to do exactly what the subcommittee says would be outrageously unjust. I read the opening sentence of that statement:

> In meeting the requirements of paragraph "second" of section 19 (*a*) of the interstate commerce act, to report the present cost of condemnation and of damages or of purchase in excess of present value, we attempt to show what the expense to a carrier will be of acquiring its common-carrier lands upon the date of valuation—

Which is always a date in the past—

> on the assumption that it did not possess those lands, but was obliged to obtain them through purchase or condemnation at the value of similar lands in the vicinity on that date.

So that the commission is compelled, in order to comply with this mandate of Congress, to make an assumption as to the value of lands which is contrary to fact. In other words, they take lands at a value

which is very largely contributed by the existence of the railroads, and then multiply that value by some figure, according to the type of the lands that they are applying the multiple to.

Now, the question is whether Congress ought to change the law as the Supreme Court laid it down in the Minnesota Rate case and put into the law something which is going to compel the commission to follow a course which as conservative a body of men as those who wrote those words characterized as outrageously unjust.

The State commissions that I represent are public officials. I think they have a sober sense of the responsibility of their positions and the duty they owe to the whole public, which includes the carriers and other public utilities that they regulate as well as the rate-paying public. They have maintained the office in which I am here in Washington since this valuation act was passed, for the primary purpose of attempting to secure the application of right principles in the valuation of these properties. They want the properties valued justly and every lawful element recognized and allowed for to the carriers. They recognize that if this valuation is proceeded with properly it can be of great public benefit, and recognize at the same time that if it is proceeded with improperly it will be a public disaster.

It can be a great public benefit, because there is nothing that the people of this country, including the owners of the railroads, so much need as that the public mind shall be set at rest as to what these railroads ought fairly to be valued at. There has been a great deal of uncertainty in the public mind on that question. Much has been said about the millions of watered securities that are out, and they do not know.

As one who has given some study to this problem and observed the attitude of the public and the vicissitudes of the railroads for the last 10 years, I suggest that one of the evils attending the situation has been the doubt in the public mind concerning the real value of the railroads of this country, which has led to a suspicion of all railroads when it does not properly apply to all of them, nor to the major part of them. And it has seemed to the railroad commissions of the States that it would be of the greatest public benefit to have this valuation worked out upon such principles, that when it is finished, the public will be able to say, "There is a value properly determined, upon which the railroads ought to earn a return."

But the commissioners know also that if the valuation is not made upon those principles, if the entirely human and natural desire of owners of railroad property to get the highest value they possibly can applied to their properties succeeds, to the extent that exaggerated values are fixed, it necessarily means the burdening of the industries of this country and the people of this Nation with unjust rates. They know there is no escape from that, because the Constitution of the United States makes value the measure of the rates. So that these values that the commission is now fixing inevitably will determine the extent of the carriers' claims for future rate increases.

We believe it is a significant fact, and nobody having to deal with this question can or will for a moment forget, that the existing rates were fixed in normal times, upon values summarily fixed, but as

accurately as the commission could fix them, which made no allowance for these fictitious, hypothetical elements condemned by the court in the Minnesota case.

The CHAIRMAN. I think your time has expired, Mr. Benton.

Mr. BENTON. Very well, Mr. Chairman. It is obvious to us that you can not include those without making the foundation for future claims of increased rates, and it is not the belief of the men whom I represent that any valuation concerning which it can be said that it was controlled by or in any considerable degree affected by outrageously unjust methods of procedure can settle the railroad question of this country on a right basis, and it is the desire of these public officials to contribute in every way they can toward the proper settlement of the railroad question, which is a great public question.

I thank you, Mr. Chairman, for your indulgence.

The CHAIRMAN. Entirely apart from your time, in my own time, I want to suggest a phase of the question that appeared yesterday which impressed me somewhat. Judge Moore claimed that if we were to eliminate these words from the statute, in view of the course which the commission has pursued in ascertaining what has been called present value, it would be a legislative declaration that there was to be nothing added to the present value as ascertained by the commission on account of any expense incurred in acquiring the land; in other words, that legislation in that way would be conclusive.

Senator MCLEAN. That is the one point that I wanted to inquire about.

The CHAIRMAN. Respecting the present value of these lands, what do you say about that?

Mr. BENTON. I should have referred to that if I had had time in my own time. I thank you for asking the question.

I have examined the case which Judge Moore referred to. It is an exceedingly extended opinion. I do not believe it is applicable, and I disagree absolutely with Judge Moore in his expressed opinion upon that point. I do that for this reason:

The amendment of the act removes merely the language which would require the commission to consider what the Supreme Court, in a decision made since Congress passed the act, said was not proper evidence, and leaves in the act the provision for reporting exactly what the Supreme Court in that opinion said was proper evidence. And in order to get the true present value of the railroad lands it is necessary to consider their original costs. The court, as I pointed out in the discussion here, did not condemn consideration of what was necessarily paid for the purpose of getting lands in strip form; it merely condemned attributing an increment to that before there was any increment. It allowed an increment to be attributed to that when there was an increment above what was paid. That is made perfectly clear. The act will stand, after you pass this, explicitly directing the commission to get the original costs of the land and to get the present value, which includes every element of present value.

Senator MCLEAN. That point is controverted, is it not?

Mr. BENTON. Well, they controvert everything. I am very glad there are some lawyers on the committee.

Senator McLEAN. The point raised by the chairman interested me yesterday, and I was about to propound that same question to the counsel for the commission.

There was one other point that, from my very brief consideration of this matter, struck me as worthy of attention, and that was that the position taken by the counsel for the commission puts the commission between his satanic majesty and pretty deep water, no matter what is done. If we pass this law with this amendment and it is challenged by the carriers and the courts follow the reasoning laid down in the English decision which was cited by Judge Moore, then you have got to go back and do this work over. Now, if you do not do that, it is the contention of the commission that the carriers can delay this thing indefinitely by compelling the valuation of every individual plat all the way along the line.

Mr. BRANTLEY. I hardly think that last proposition would apply, so far as the carriers demanding a valuation, parcel by parcel, is concerned. It is just as applicable to the ascertainment of acreage value as it is to the ascertainment of strip land. The commission takes the land of the carriers in determining what they call acreage value, and divides it into zones. They do the same thing with the cost of acquisition. There is not any controversy there.

Senator McLEAN. But if we adopt this amendment and it is challenged and it is held by the court to be ultra vires, then the commission has got to go back and do this work over.

Mr. BRANTLEY. Undoubtedly.

Senator McLEAN. And whether it will not expedite matters to just leave the law as it is, is an important question with me, provided the carriers do not resort to every technicality, as intimated by counsel for the commission that they will do, and kill more time than would be occupied if we went ahead under the existing conditions. You have got a question of law there which is controverted.

Mr. BENTON. I want to make this further observation in respect to Judge Moore's position, and that is that they have answered it themselves. They have said—and I believe this to be right—that Congress can not take away elements of value, as they can not take away property either in whole or in part. When Congress provides for the reporting of the present value of these lands it necessarily includes every element of value, and to limit it would be to make the act unconstitutional. Now, it is an elementary principle of law, I believe, that the Supreme Court never will so construe an act as to render it unconstitutional if any other construction will make it constitutional.

Senator McLEAN. You have no fear that the Supreme Court will fail to sustain this law if it is passed with this amendment?

Mr. BENTON. I have absolutely no fear. I have very grave fear, on the other hand, that if you let it stand the public will be prejudiced.

The CHAIRMAN. This suggestion of mine, of course, does not change my opinion with regard to this amendment. This is my attitude—and I have given a good deal of study to it. I do not believe that Congress has the right, the power, to prescribe any standard of value or fix the elements which any court may consider in determining what the value of a particular property is. I am for this amendment, because I believe it to be absolutely impossible for the com-

mission or any other judicial tribunal or any man to ascertain now what it would cost to acquire, either by condemnation or purchase, the lands of an existing railroad company. But on the other hand, I do not want to become responsible for an act of legislation which will declare that the commission is pursuing the right method for the ascertainment of present value. I want to give that to the commission and afterwards to the court without any legislative direction at all.

But I am for this bill only because I think we have prescribed an element which is not only incapable of being ascertained but which is not a proper element of value at all. I do not want the act, if it should pass, to bear the construction that we are approving or verifying or authenticating the practice which the commission has up to this time pursued. That would be unfair, of course, both to the railroads and to the public. I wondered what reply you would make to Judge Moore, because that was a point that impressed me pretty seriously.

Mr. BENTON. My answer is, as I have already stated, that the act as reported would call for the reporting of these very costs that they are thinking about, and the commission in its final valuations is including them. That is a matter which ought to be inquired about of the chief counsel rather than myself; I am not in the employ of the commission.

The CHAIRMAN. Undoubtedly it will be the subject of a good deal of discussion in the committee before we report. We will close the hearings.

Mr. BRANTLEY. Mr. Chairman, I brought down this morning two or three copies of the brief filed by the carriers in the Kansas City Southern mandamus case in the Supreme Court. The brief of the commission has gone into the record. It is a very interesting question, and I wondered if it would be permissible to put our brief in the record.

The CHAIRMAN. We will consider it a part of the record.

Mr. BENTON. If it can be done I would be glad to have the letter dated May 27, 1921, written to you, Mr. Chairman, by Mr. Webster and myself, appended to the hearing.

The CHAIRMAN. Was not that put in the record the other day?

Mr. BENTON. No, sir; it was not.

The CHAIRMAN. That will also be put in the record, because it contains some very valuable information with regard to what the commission has been doing.

Here is some additional matter submitted by Mr. Silver, of the American Farm Bureau Federation, in the House hearings, which he desires shall be made a part of these hearings. We will not reprint it, because it is already printed, but this statement will become a part of the hearings.

(The additional data directed by the committee to be incorporated in the record are here printed in full, as follows:)

BRIEF AMICI CURIAE.

In the Supreme Court of the United States. October term, 1919. No. 413. The United States of America, on the relation of the Kansas City Southern Railway Co., plaintiff in error, v. the Interstate Commerce Commission.

STATEMENT.

An order having been entered, granting permission to file a brief as amici curiae, this brief is filed by counsel on behalf of the presidents' conference committee, an organization of the executives of the railroad companies, representing the ownership of approximately 224,000 miles, or 85 per cent of the railroad mileage of the country.

The Interstate Commerce Commission, in the enforcement of the act approved March 1, 1913, amendatory to the act to regulate commerce, and providing for the valuation of the properties of carriers subject to said act, has declined in the case of the Kansas City Southern Railway to ascertain and report the present cost of condemnation and damages or of purchase of the carrier lands of said company, basing its declination upon the ground that it is impossible as matter of law to ascertain and report the present cost of condemnation and damages or of purchase of the carrier lands of any railroad company. The interest of the presidents' conference committee in the pending case arises by virtue of its representation in matters involving the valuation of the properties of the various railroad companies embraced within its organization, and the said committee believing that the conclusions reached by the Interstate Commerce Commission as stated are erroneous, it has sought, through its counsel, permission to file a brief on the question involved, and such permission being granted this brief is now submitted.

ARGUMENT.

Point 1. The valuation act plainly requires the investigation, ascertainment, and report of the present costs of acquisition of railroad lands.

The duty of the commission with relation to the execution of the valuation act is prescribed by its terms. There is no dispute as to what the act prescribes. It requires, in plain and implicit language, the investigation, ascertainment, and report of the present cost of acquisition, and also the present value of railroad lands. These requirements are found in paragraph "First," in the language: "Said commission shall ascertain and report in detail as to each piece of property owned or used by the said common carrier for its purposes as a common carrier, * * * the cost of reproduction new, * * *," and paragraph "Second," which applies solely to land, providing that: "Such investigation and report shall state in detail, and separately from improvements, * * * the present value * * * and separately the * * * present cost of condemnation and damages, or of purchase * * *."

The commission makes no denial of these requirements. It has admitted in its decision in the Texas Midland case (1 Val. Rep., 54) that the act requires the investigation, ascertainment, and report of the present cost of acquisition of railroad lands. The commission says (p. 54): "* * * the direction in paragraph entitled 'Second' for the ascertainment of the present cost of condemnation and damages, or of purchase, in effect calls for a finding as to the cost of reproduction of these lands."

On page 163, the commission says:

"This, however, is not of much practical importance, for paragraph 'Second' requires the commission to report, if not the cost of reproduction, at least what amounts to the same thing."

On page 164, the commission says:

"The right of way of a carrier is frequently donated, but in so far as the carrier must acquire this by purchase or condemnation the cost generally exceeds the acreage value of the lands taken. This is partly due to the peculiar shape of the piece acquired and partly to other causes. This excess cost to the carrier is a thing of importance in the actual production of its railroad, and the carrier claims that it ought to be given weight in the estimate of reproduction. Evidently this was the fact for which Congress intended to inquire. What did it cost and what would it now cost the carrier to procure its right of way and other operative lands in excess of the market value of such lands by the acre?

"If this construction is correct, the commission is required to report as to the operative lands of a carrier the following facts:

"1. Original cost.

"2. Present value.

"3. Cost of procuring right of way in excess of acreage value at the time of dedication to public use.

"4. Cost of procuring right of way at the present time in excess of present acreage value."

The commission thus recognizes that the act requires the ascertainment of the present cost of acquiring the carrier's lands, and that this cost of acquisition "generally exceeds the acreage value of the lands taken." By "acreage value of the lands taken" it means their value, for example, upon the basis of the value per acre of the 160-acre farm through which the right of way passes and from which its area is carved. The commission, refusing to estimate these costs of acquisition in excess of this "acreage value," finds a "present value" which is limited solely to the so-called "acreage value." The refusal of the commission to find the higher cost of acquisition and its reasons for restricting its investigation to the so-called "acreage value" are explained in detail in the Texas Midland decision (1 Val. Rep., 53). In defining the "present value" which it reports for carrier lands, it says:

"Present value is arrived at by ascertaining the number of acres of land owned or used by the carrier for its purposes as a common carrier, and multiplying this acreage by a market value determined from the present market value of similar and adjoining lands."

On page 167, it says:

"Present value as reported by the commission is *nearly synonymous* with market value. What is done is to ascertain the number of acres of carrier land, to determine the market value of similar land adjoining or in the immediate vicinity *per acre* and to apply that price to the number of acres." [Italics ours.]

The commission thereby reports a "value" derived by applying to the acres of land owned by the carrier a market value determined from the present acreage market value of adjacent and adjoining lands in the sizes and shapes in which those adjoining lands exist and which, by reason of the fact that they are devoted to other than railroad uses, are not similar in size and shape to the lands owned by the railroad. The railroad lands, and particularly rights of way, are peculiar in that there must be a continuity of title in strips of narrow area located with particular reference to conditions of topography and community development. Being devoted to a peculiar use requiring such areas in shapes and sizes dissimilar to those of the lands devoted to ordinary agricultural or industrial purposes, railroad lands can not be acquired upon the basis of the market value of land in the shapes and sizes usable for such agricultural or industrial purposes. The universal experience of the carriers in the acquisition of their lands demonstrates this fact, and its recognition is found throughout the authorities in which the legal principles underlying the acquisition of such lands are outlined. Not only must the carrier pay for the area which it secures, but additional amounts must be paid for the damages to the adjacent property from which the railroad areas of peculiar shapes are taken, due to the injury done to such property both by the severance of the land taken and by the inconvenience and annoyance caused by the operation of trains once the railroad is constructed. The carrier thus acquires not only the title to the area actually taken, but certain rights in the adjoining lands which are analogous to easements, by virtue of which the carrier has the right in the construction and operation of its railroad to damage continuously the adjoining property. The commission in the excerpt above quoted from the Texas Midland case admits these things. The commission in its decision also says (1 Val. Rep. 1, 170):

"It can not be denied that frequently the cost to a railroad of acquiring its right of way with respect to parcels which must be purchased materially exceeds the acreage value of the land taken. Previously to the decision of the Supreme Court in the Minnesota Rate cases it seems to have been understood by many commissions and valuators that the proper method of determining the present value of the operative lands of a carrier was to inquire what it would cost to acquire those lands upon the basis of present prices. For the purpose of determining the excess of such cost over acreage value many studies were made of pieces of construction where the known cost could be compared with the acreage value, and from these investigations were deduced percentages which varied for rural right of way from 150 to 300 per cent, being less in case of city lands."

These excess costs arise from the fact that the carrier acquires not only the acreage actually occupied by his right of way, but in addition must pay amounts for the damages done to the residue of the tract of which the land taken formed a part, thereby securing rights, analogous to easements, over the adjoining property. In United States *v.* Grizzard (219 U. S., 180, 183, 184), the court said:

"Whenever there has been an actual physical taking of a part of a distinct tract of land, the compensation to be awarded includes not only the market value of that part of the tract appropriated, but the damage to the remainder resulting from the taking, embracing, of course, injury due to the use to which the part appropriated is to be devoted. Thus, in Sharp *v.* United States (191 U. S., 341, 353), damage resulting to adjacent but distant parcels was denied because there had been no actual appropriation of any part of such separate parcel, but the principle was conceded as to injury, from the character of the use of that taken to that untaken of the same tract. Upon this distinction the court said: 'Upon the facts which we have detailed we think the plaintiff in error was not entitled to recover damages to the land not taken because of the probable use to which the Government would put the land it proposed to take. If the remaining land had been part of the same tract which the Government seeks to condemn, then the damage to the remaining portion of the tract taken, arising from the probable use thereof by the Government, would be a proper subject of award in these condemnation proceedings. But the Government takes the whole of one tract.' To the same effect see Cooley's Constitutional Limitations, pp. 565–566."

From these facts it clearly appears that railroad lands normally are secured at a cost of acquisition which is in excess of the market value of the land taken; that these costs arise by virtue of established legal precedents pursuant to which the carrier is required to incur them; that the commission has recognized the fact of the existence of such costs, and that the act intends to require and does require their reporting, but that the commission refuses of report them.

The reason for the incorporation of these requirements in the valuation act lies in a number of considerations. The act requires the investigation, ascertainment, and report of the value, not only of the land, but of all the property of the railroads, and requires in addition a study and report of certain important facts which are relevant to the question of value. The value of railroad property is a question of fact. As was stated in the Minnesota Rate cases (230 U. S., 352): "It is not a matter of formulas, and there must be a reasonable judgment having its basis in a proper consideration of all relevant facts." The court, in defining the scope of this inquiry as to the facts, quoted the language of Smythe *v.* Ames (169 U. S., 466), which has become a cornerstone of valuation precedent:

"In order to ascertain that value, the original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stock, the present as compared with the original cost of construction, the probable earning capacity under particular rates prescribed by statute, and the sum required to meet operating expenses, are all matters for consideration, and are to be given such weight as may be just and right in each case. We do not say that there may not be other matters to be regarded in estimating the value of the property. What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience."

An examination of the legislative history of the valuation act shows the intent of the framers of the bill to require the ascertainment and reporting of all these facts pertaining to value which were mentioned by the court, each one of which, among numerous others, is specified in its provisions, and each of which constitutes a prescribed field of inquiry.

One of the facts pertaining to value which is mentioned by the court in the language above quoted is the "present as compared with the original cost of construction." The "present cost of construction" must be complete, otherwise it is misleading. Its completeness necessarily requires the inclusion of the present cost of acquiring the carrier lands as well as its other property. Clearly the cost of acquiring those lands is as important as the cost of constructing the roadway and buildings upon them. It can not be doubted that what would have to be paid today to acquire those lands, in accordance with the present-day practices and the experience of the carriers in so doing, and pursuant to the principles of law governing such acquisitions and the amounts payable in such cases, is not only relevant to the present value of such lands, but would in the normal case be a predominating and controlling consideration. Clearly such costs would be more controlling than the alleged "acreage value" now determined by the commission, and which it admits is incomplete in that there are excluded certain items of cost covering elements of value which normally and almost inevitably attend such purchases. The reason is therefore clear why Congress included this important requirement in the valuation act. Without such evidence the basis for determining valuation would be essentially defective.

Aside from the necessity of the ascertainment of the cost of acquiring railroad lands with relation to the determination of value, the intent of Congress was obvious also to insure the marshaling of all of the information, statistics, and data in which it was thought there could be found a foundation upon which to rest a scientific regulation of various railroad problems. Information was desired as to what it would cost to produce this property to-day under modern conditions, thus affording information relative not only to the question of value, but thought to be possibly desirable for such purposes as affording a check of the reasonableness of the carrier's plant accounts, the fairness of capitalization, the adequacy of depreciation annuities, and other kindred matters. The complete present costs of constructing the railroads, as distinguished from a partial estimate of such costs, is essential for such purposes.

Point 2. Since the language of the act requires that the commission ascertain the cost of acquisition the commission can not question the wisdom of Congress, nor can it refuse to perform the duty imposed unless such performance is absolutely impossible.

The valuation act orders an investigation, ascertainment, and report of definitely specified matters. A large part of the act is a bill of specifications detailing with exactness the facts which are ordered to be investigated, ascertained, and reported. Under these circumstances several propositions would seem to be manifest and not subject to reasonable question. In the first place, the commission has no discretion as to whether it shall perform the duties imposed. While judgment may be exercised by it, as the expert agency to whom these duties are delegated, in making its determination within the specified issues, it is not for the commission to substitute its judgment for that of Congress, and to question the wisdom of Congress in legislating as it did and as a result of a difference of opinion to refuse to enter the fields of investigation which Congress prescribed. The language of the act is mandatory. It is the mandate of sovereignty. It is the law of the land, and made so by the legislative branch of the Government within the proper exercise of the functions of that branch. It is a direction to an inferior and subordinate agency of the State, which is itself the mere creature of the State, which exercises its authority only as a result of the certain prescribed and delegated powers and duties which give it life. One of the duties imposed by the sovereign State upon its servant is prescribed by the act as the determination of a certain specified fact. It is not within the scope of the powers of the commission to test the wisdom or expediency of that delegation of duty and authority.

In the second place, if, from the very nature of things, the duty imposed is impossible, in that it cannot be accomplished by anyone possessing the utmost skill and knowledge, the commission is excused from the performance of its duty. But in this relation impossibility is to be distinguished from impracticability or from inadvisability. Questions of expediency, inconvenience, or hardships are not relevant to the issue. It matters not how much effort the ascertainment will require, what expenditures are necessary, or what may be done with the results or conclusions once they are derived. If the estimate of the cost of acquisition can in any possibility be made, any considerations going to the hardship or difficulty of making the ascertainment, or of the worth of the results when ascertained, are not material to the issue. The commission's refusal to follow the mandate of the law can only be justified if it is established that in the very nature of things the commission can not make the estimate of probable costs of acquisition which the act requires, which incapability arises because such costs of acquisition under any method or theory do not lie within the limits of rational determination. This means impossibility of rational determination under every hypothesis consistent with reasonable valuation theory and legal precedent.

The following cases are pertinent: The Harriman (9 Wall., 172); Beebe r. Johnson (19 Wend., 500); Hare on Contracts, 639.

We contend that it is practicable to ascertain such costs, that they can be reasonably ascertained and that their ascertainment is necessary to the ascertainment of the value of the railroads and the execution of the valuation act.

Point 3. The ruling in the Minnesota Rate cases considered as a ruling upon a principle of constitutional law does not affect the duty of the commission to perform the acts specified in the valuation act.

Prima facie the conditions which we have heretofore outlined point so clearly to the propriety of compliance by the commission with the law that we may with profit next examine the grounds of the commission's refusal. Its refusal is based primarily upon its interpretation of the decision of the court in the

Minnesota Rate cases (230 U. S., 452). This ground is stated by the commission in its answer in this proceeding and is the foundation of the decision of the commission in the Texas Midland case. It is the commission's position that the position of the court in the Minnesota Rate cases establishes that the ascertainment of the present cost of condemnation and damages or of purchase of railroad lands has no lawful or rational basis.

In this connection the fact must not be overlooked that the refusal of the commission to comply with the act is entire. It declines to report the present cost of acquisition of the railroad lands, even where that ascertainment can be made with complete accuracy. For example, it would seem clear that where the actual acquisition of such property had been so recent that the conditions obtaining at the time of purchase were substantially those of the date of valuation assumed by the commission in making its report, the "present cost of condemnation and damages or of purchase" would be substantially the same as that original cost. Therefore the findings required by the valuation act could be made accurately and without the exercise of any assumptions. The commission, however, refuses to make any findings of the cost of acquisition of railroad lands under such circumstances. It is alleged in the amended petition, and the allegation is not denied, that certain lands were acquired by the plaintiff for right of way purposes shortly before the date of valuation through condemnation proceedings, at an actual cost of $180,000, but that the commission has reported the so-called "present value" of these lands at $60,000 (R., pp. 34, 35).

The commission thus declines to report the present costs of acquisition. The decision of the commission in the Texas Midland case and in the cases decided subsequent thereto is absolute and unqualified. (Winston-Salem Southbound Railway Company, 1 Val. Rep., 187; Kansas City Southern Railway Company, 1 Val. Rep., 223.) It, therefore, appears that the position of the commission, founded upon the decision of the Minnesota Rate cases, assumes that the decision established as a matter of law the impossibility of the ascertainment. In view of the reliance of the commission upon the doctrine of the Minnesota Rate cases, we may therefore properly direct ourselves to the consideration of the relationship of that decision to the duties of the commission prescribed by law.

The Minnesota rate cases did not involve the valuation act. They were submitted for decision before the act was passed. The crux of the issue presented in these cases was the constitutionality of State-made rates, which the carriers asserted were confiscatory in that they did not permit a fair return upon the value of the property devoted to public service. The court at the beginning of its discussion reiterated the established principle of law that the rates must pay a reasonable compensation upon the fair value of the property devoted to public service. Whether confiscation had been effected by the regulation under attack depended upon the relationship of the returns under the prescribed rates to the value of the property used. This was the announcement of a substantive rule of constitutional law. The court then said that this value was to be determined as a question of fact:

"In determining whether that right (i. e., the right of receiving 'just compensation') had been denied, each case must rest upon its special facts. * * * The ascertainment of that value is not controlled by artificial rules. It is not a matter of formulas, but there must be a reasonable judgment, having its basis in a proper consideration of all relevant facts" (p. 434).

The court, having laid down as a proposition of constitutional law that value was the test, thus defined the issue of fact and considered in detail the testimony regarding the cost of acquisition and "railway value" of the lands in question. The court said:

"The constitutional invalidity must be manifest, and if it rests upon disputed questions of fact, the invalidated facts must be proved" (p. 452).

It decided that the necessary facts were not proved. It pointed to certain defects in the proof, and repudiated the value founded upon this evidentiary basis. At the conclusion of the court's discussion it uses language which clearly indicates that its consideration is confined solely to the issue of fact. It said:

"Finding this defect in the proof, it is not necessary to consider the objections which relate to the sources from which the property was derived or its mode of acquisition * * *" (p. 56).

Value as a question of fact was thus passed upon in the light of the evidence submitted, but there is nothing in the opinion indicative of a holding that the present cost of acquisition of the railroad lands in question, properly ascertained, was not relevant to the issue of value.

From these considerations it is entirely clear that the court did not decide that the test of confiscation, as a question of substantive law, is not the value of the carrier lands, based upon a consideration of their estimated cost of acquisition among other relevant facts, provided that this cost was ascertained on other bases than those hypotheses which the court condemned. It would have been inconsistent with the entire trend of judicial precedents upon this question, and with the opinion of the court itself, as expressed in the language which we have quoted, for the court to have prescribed as a rule of law that the utility was not entitled to a return upon a value ascertained by a consideration of such relevant facts as an estimate of the present cost of acquisition, since the principle has been long and firmly established, as the opinion itself states, that the test of confiscation in a case involving rates is value, the determination of which is a question of fact. The error of the commission lies in the fact that it takes dicta from the discussion of issues of fact and elevates it to the position of a pronouncement of a substantive rule of constitutional law. This alleged substantive rule, that the carrier is entitled to a return only upon the value of its lands determined upon the basis of the acreage value of the adjoining tracts of dissimilar size and shape and without any consideration of the cost of acquisition of the carrier's lands, is inconsistent with the fundamental proposition of constitutional law first announced, to wit, that the carrier is entitled to a return upon the fair value of its property, which, as a question of fact, is to be determined by a consideration, not of any one class of information, but of all of the relevant facts.

In the case of Cohens v. Virginia (6 Wheaton, 264) Chief Justice Marshall said:

"The counsel for the defendant in error urge, in opposition to this rule of construction, some dicta of the court, in the case of Marbury v. Madison.

"It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision.

"The reason of this maxim is obvious. The question actually before the court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated" (pp. 399–400).

The maxim of the law is so familar to the courts and lawyers that a statement of it is seldom necessary. Occasionally when lawyers in the zeal of advocacy seek to press too far mere language or dicta the courts allude to this well-known rule. For example, see the Kansas City Southern case (231 U. S., 423), where it is said:

"The expressions quoted were properly employed with respect to the questions then presented for decision" (p. 447).

Recently the Circuit Court of Appeals of the Eighth Circuit found it necessary to fully restate the rule and apply it. See Northern Pacific Railway Co. v. North American Telegraph Co., (230 Fed., 347), where it is said:

"As the facts upon which the opinions in the cases cited rest are materially different from those in the case at bar, it is indispensable to a just appreciation of these decisions and of the opinions in these cases, and of their bearing upon the crucial question in the case at bar, that in their examination and discussion these familiar rules announced by Chief Justice Marshall be borne constantly in mind" (p. 355).

The circuit court then repeats the language of Chief Justice Marshall in the case of Cohens v. Virginia, above quoted.

Even had the court held in a rate case, as a matter of law, that the cost of acquisition of the carrier lands could not be used to determine their value, is such a holding upon such an issue and in such a case relevant to the duties prescribed by the act of Congress? The impossibility, because of a declared rule of law in a case involving the issue of confiscation by rate regulation, of using such information in such a case, can not relieve the commission from its duties under the mandate of Congress. As heretofore suggested, Congress has ordered the marshalling of a variety of information thought to be desirable as the groundwork for possible methods of solution of various phases of the railroad problems. Assuming that this erroneous construction of the decision of the court in the rate case in question is proper (which we emphatically deny),

it has been urged that there are other and diverse uses of such facts and information in critical lines of inquiry and investigation, aside from that of testing whether rate regulation is confiscatory. The impossibility of the lawful use of such facts in one of various fields of investigation is no justification for refusing to do what Congress ordered done, and which may be useful for other important purposes. The desire of Congress, and its judgment as to the matters regarding which it desires information is supreme. It is not within the power of the commission as a servant of the Government to substitute its desire or judgment for that of the Government. Irrespective of the relevancy of such information in a case involving the issue of confiscation by rate regulation, Congress had the power to require the ascertaining and reporting of such information, or of any other information, which it desired.

An examination of the Minnesota Rate cases discloses that there was properly repudiated a value based upon assumptions which were so inconsistent with law and fact, that the results derived were entirely excessive and unreasonable. But this criticism of the conclusions of fact based upon such assumptions can not justify the refusal of the commission to make such estimates based upon assumptions which are consistent with law and fact.

In the first place, it is clear from the language of the opinion as a whole, as we have already suggested, that the consideration of the cost of acquisition of railroad lands in that case was a consideration of the facts upon which the finding of value of the court below was based. Having opened its discussion with a statement of the fundamentals upon which it proceeded, by defining the issue of the ascertainment of value as a judgment based upon a proper consideration of all relevant facts, the proof was considered, the opinion stating that "the constitutional invalidity must be manifest, and if it rests upon disputed questions of fact, the invalidating facts must be proved." After a critical analysis of the testimony, and because of specified defects in the proof, the court concluded:

"By reason of the nature of the estimates, and the points to which testimony was addressed, the amount of the fair value of the company's land can not be separately determined from the evidence, but it sufficiently appears for the reasons we have stated that the amounts found were largely excessive."

Clearly the estimated cost of acquisition of railroad land is a fact relevant to the determination of its value. The decisions of the courts indicate that in a preponderance of cases, the cost of reproduction of the physical property other than land has been recognized as a controlling factor in the determination of value, and the relevancy of such cost is universally recognized. It can not be seriously contended that this court could have attempted to prescribe any rule for the ascertainment of value, as a question of fact. Its intent to do so was specifically denied when it said:

"The ascertainment of that value is not controlled by artificial rules. It is not a matter of formulas, but there must be a reasonable judgment, having its basis in a proper consideration of all relevant facts" (434).

Clearly, therefore, the court did not hold that the ascertainment of value could be limited to any certain designated facts. The language above quoted negatives any possible attempt to restrict the scope of consideration to any certain class of information, or to exclude from consideration any facts which are relevant, provided that they are properly established on dependable and logical grounds.

The court was therefore merely passing upon the questions of fact as those questions were presented by the testimony which had been offered. The general language used in this consideration must be interpreted, having in mind the point to which the court addressed itself. The methods which were condemned were the methods in issue, and used in that case. An examination of the decision shows that there is continual reference to the specific testimony which the court was considering, and that any general observations which the court made can refer only to the specific problem then under consideration. The present cost of acquisition of lands now owned is an estimate resting on certain assumptions. In the range of the possible assumptions which in the exercise of judgment, might be adopted, the court of necessity could consider only those which were in issue in the testimony then under consideration.

For example, examination of the opinion discloses (p. 450), that the court condemned the offered estimate of acquisition costs, in that it rested upon a "supposed compulsory feature of acquisition," and contemplated "that the company would be compelled to pay more than fair market value" and thus would be deprived of its lawful right of the exercise of the powers of eminent domain under

established principles of law controlling that exercise. The court likewise condemned the assumption used, that the company would be bound to pay an excessive "railway value of its property," and pointed to the fact that this assumption was directly in conflict with the established principles of law, enunciated in condemnation cases and restricting the allowance to the market value. The court specifically stated (p. 452) that there is no evidence before us from which the amount which would "properly be allowable in such condemnation proceedings can be ascertained," thereby manifestly implying that had the estimate been based upon correct assumption, and had there appeared what "would properly be allowable in such condemnation proceedings," such market value determined in accordance with legal precedents would have been properly the basis of the fixing of value.

Similarly, the court said (p. 452) that the contemplation of the complete removal of the road and a readjustment of its values because of such obliteration, was "to indulge in mere speculation." So again the court condemned the assumption that "all the difficulties which might be imagined as incident to such a 'reproduction' were considered," and that the "increase sought for 'railway value' in these cases * * * is an increment which can not be referred to any known criterion, but must rest on a mere expression of judgment which finds no proper test or standard in the transactions of the business world" (pp. 453–455).

Applied to the testimony thereunder consideration, and the important parts of which were quoted in the court's opinion, such criticism of the evidence then before the court was unquestionably fair. But as the basis for the refusal to consider facts based on reasonable and lawful assumptions and resting upon known criterions, not founded in imaginative conjecture, but finding a test and standard in the current and common business transactions of the railroad companies generally in the purchase of lands, it wholly fails.

Specific criticism by the court of specific testimony can not foreclose the investigation or ascertainment of facts in that same field of thought, if that investigation or ascertainment is prescribed on the basis other than the one condemned, and avoiding the vice specified. To so hold is to destroy the fundamental proposition announced in the opinion that value is to be derived by a consideration of all relevant facts, and makes impossible the formation of a sound judgment since the basis of judgment is not as broad as the subject considered.

In the commission's decision of this question in the Texas Midland decision (p. 54) it states the necessity of assumptions and states what these assumptions shall be. In that decision, it erroneously assumes the necessity of the maximum assumptions, and states that the act in requiring the cost of reproduction of the carrier lands requires the assumption that the property in question "is to be taken as nonexistent." It states that it is sophistry to contend that the lands of the railroad can be reproduced "without first making the assumption that they are no longer lands of the railroad; and this necessary assumption carries with it the mental obliteration of the railroad itself." The commission then discusses, as decisive of the issue, the language of the Minnesota Rate cases, in which was condemned the use of assumptions based upon inadmissible and speculative hypotheses, as though such hypotheses were the only possible hypotheses, and the commission repudiates evidence introduced by the carrier upon the ground that its method was not distinguishable from that condemned in the Minnesota Rate cases.

That the commission kept continually in mind assumptions of the most extreme sort, such as those condemned in the Minnesota Rate cases, is clear from the following language (p. 61): "Not alone do the uncertainties that we have referred to surround what would be the conditions of ownership, of improvement and of value of near-by property and of general industrial development, but there can be no certainty as to what land would have to be acquired at a cost to the carriers upon reproduction or a present acquisition," and the commission then proceeds to discuss the difficulty of ascertaining what percentage of the carrier's land would be donated to it by communities or individual owners. Then the commission states its inability to determine with accuracy what conditions would exist if these maximum assumptions were made, which contemplate the entire "mental obliteration" of the railroad itself, and the changed conditions of the ownership of adjoining property, the changed status of the improvement of the property adjoining the railroad and of the community generally, the different value of the near-by property, and a new status of the general industrial development of the community, resultent from the complete elimination of the railroad from the community, and the

removal of its influence upon such general conditions as the conditions of ownership, value, improvement, and general community industrial development. (Texas Midland decision, p. 61.) We feel that Congress could not have intended to require the determination of an estimated cost of acquisition based upon any such processes. But can the statement by the commission of the possible exercise of unreasonable judgment in the making of an estimate effect a nullification of the law requiring it to make such an estimate in the exercise of reasonable judgment?

The commission in its erroneous interpretation of the opinion of this court in the Minnesota Rate cases has gone so far as to assume that the opinion in that case condemned the cost of reproduction method as applied to lands as being an "impossible hypothesis." In the brief of the commission now before the court it is said, page 10:

"This court clearly states, in substance, that the estimate of present cost of condemnation or damages, or of purchase, which appellant is asking the court to compel the commission to make, is an estimate which is wholly beyond reach of any process of rational determination. In this connection it points out that the appraisers of lands involved in the Minnesota Rate cases in an attempt to estimate the cost of acquiring the lands, were presented with an impossible hypothesis."

This court in the Minnesota Rate cases, page 453, said:

"Presented with an impossible hypothesis, and endeavoring to conform to it, the appraisers—men of ability and experience—were manifestly seeking to give their best judgment as to what the railroad right of way was worth."

The hypothesis here referred to was that presented by the specific assumptions upon which the witness proceeded in the specific testimony which the court then had under consideration. It can not be assumed that reference could be made to the hypothesis presented by other assumptions, or by assumptions based upon such reasonable and legal grounds, as would avoid the vices which were the basis of the court's criticism of the specific testimony which it considered.

Careful consideration of the opinion points clearly to the fact, furthermore, that the "impossible hypothesis" to which the court refers was, in fact, not the determination of the cost of acquisition, but the determination of a "railway value." The court said on page 452:

"The cost of reproduction method is of service in ascertaining the present value of the plant, when it is reasonably applied, and when the cost of reproducing the property may be ascertained with a proper degree of certainty. But it does not justify the acceptance of results which depend upon mere conjecture."

What the opinion condemned as an "impossible hypothesis" was the assumption of the existence of a peculiar railway value which the appraisers sought to determine. The court said of this character of value that it "must rest on a mere expression of judgment which finds no proper test or standard in the transactions of the business world."

The opinion, page 445, contains this statement:

"In the latter part of 1906 the State notified the company to report the value of its properties, requiring a statement in one column of the 'market value' and in another column of the 'value for railway purposes.' Mr. Cooper was instructed to prepare the valuation for this report."

The entire opinion in so far as it relates to land values is devoted to a criticism of the requirement thus made by the State that "value for railway purposes" or "railway value" be reported. This character of value the court condemned as an "impossible hypothesis."

The reasoning of the commission that it can not determine the cost of reproduction of lands because it has no way of ascertaining or fixing the proportion of the railroad lands which would be donated in a reproduction finds no support in the opinion of this court in the Minnesota Rate cases. This court there declared, page 454:

"The property is held in private ownership, and it is that property and not the original cost of it of which the owner may not be deprived without due process of law."

The fundamental inquiry which the commission is to make under the valuation act is as to the value of the property of the railroad, including the value of its lands. In the determination of the "present value" of carrier lands the fact that the carrier originally paid little or nothing for them is of no

consequence. It is not the original cost of the lands of which the carrier may not be deprived without due process of law, but it is their value at the time of the deprivation. The estimated present cost of acquiring the lands is one of the elements named for consideration in the determination of their present value, and in the ascertainment of such present cost of acquisition the fact that certain of the lands may have been donated is entirely irrelevant. In paragraph second the act requires the investigation and report of the "present cost of condemnation and damages or of purchase." This provision contemplates the ascertainment of the cost of acquiring by condemnation or purchase the land in question. It contemplates this acquisition at a cost. It does not contemplate acquisition by donation free of cost.

Point 4. The nature of the problem of ascertaining the present cost of acquisition of railroad lands.

The "present cost of condemnation and damages or of purchase" of the lands of the carrier is necessarily an estimate. It is the present cost of acquiring something which is already owned, and which can not, therefore, be actually again acquired. The requirement of ascertaining this cost therefore contemplates a cost under conditions which are contrary to the existing fact, and requires a theoretical ascertainment of the cost of property, the title of which is assumed for purposes of the calculation to be not in the carrier, but in some one else from whom acquisition is to be made. Congress therefore necessarily contemplated the making of assumptions when it delegated this theoretical task to the commission. Congress did not designate what the assumptions should be. That determination is delegated to the commission under the natural expectation that the assumptions will be fixed on a basis so consonant with practical experience that the results derived will afford information of the present cost of establishing these properties and of what the investment under present-day conditions would be as compared with the actual or original investment, thus affording information pertaining not only to the question of value but desirable for various other purposes contemplated by Congress, and in the determination of which information regarding what investment would be required to establish these properties to-day, and under present conditions, is desirable.

Necessarily there is latitude in establishing these assumptions. The subject does not permit of the didactic pronouncement of fixed rules. Valuation is not an exact science. Value and estimated costs lie in zones of reasonableness, and are matters of sound judgment based upon a consideration of the controlling circumstances. The determination, however, is not one of mere conjecture. It is a matter controlled by sound judgment. Congress contemplated that the entire ascertainment should be made in the exercise of such judgment and with conscientious skill. Estimated costs are of frequent service in the ascertainment of value. Congress could require the making of skilled estimates.

The position of the commission is not consistent with this broader view of the problem, but is affected by a literal interpretation of certain dicta in the opinion of the Minnesota Rate cases, of which a fetish is made, and which are even quoted almost in verbatim form in its amended answer. The position is based primarily upon the proposition that the assumptions condemned in that opinion are those which it should apply in the exercise of its skilled judgment, and that the determination of these estimated costs is not possible without the indulgence of that conjectural reasoning which was there properly condemned and upon which condemnation the refusal of the commission to obey the law is based.

As just stated within the latitude of the possible assumptions resting in judgment, Congress contemplated that the commission would exercise sound judgment. The problem being the estimate of the present cost of acquiring what the carrier owns, and, therefore, in fact, need not acquire, there is necessitated, at least, the assumption of a changed condition to the extent of the status of title. This would seem to be a minimum of assumption. In the widest range of assumption, as distinguished from this minimum, it would be possible to assume the nonexistence of the road, that it has never been built, that the community development which has resulted from its existence has not occurred, that the resultant value now existing in the community could not therefore exist, and that under this mental obliteration of the road there would be necessary a hypothetical readjustment of the community values, which are now the result of its existence. The commission assumes the necessity of such speculation, and predicates its refusal upon the impossibility of doing the obviously unreasonable. Need skilled judgment, however, go to this degree?

The error of the position of the commission is that it recognizes no degrees of reasonableness, and places all estimates of the cost of acquisition of rail-

road land on the plane of the estimates which the court criticised. Where Congress has ordered the reporting of facts in the exercise of reasonable judgment, the commission now refuses to act because of the fact that the court, in the criticism of certain testimony, has condemned estimates which were not based upon reasonable judgment. Where the court criticised certain assumptions in a certain case as unwarranted, the commission now refuses to enter the field of the investigation involving any assumptions, not on the ground that a reasonable judgment can not be formed on a minimum assumption, but that to enter such field it must adopt assumptions justified neither by fact nor law, and which for those reasons the court condemned. This position is plainly fallacious. It is founded upon a misconception of the duties imposed by the act, the applicability of certain obiter dicta to the problem in question, and the scope of judicial precedent.

Among the decisions of courts and commissions may be found language critical of estimates of the cost of reproduction of public utility property other than land. This criticism is directed merely to the facts of the particular case. Fantastic overheads have been included, based on highly theoretical and imaginative conceptions of how the property would be reproduced, and every contingency and difficulty of construction which could possibly be met in the building of the property has been included and reflected in excessive costs. The commission, relying upon the decisions of such courts and commissions in passing upon those issues of fact, might as well refuse to report the cost of reproducing the buildings and other structures of the railroads, as to refuse here to report the cost of acquisition of the railroad lands. Judicial criticism of the proof of the facts relied upon by the parties in litigation involving the issue of the confiscation of property by rate regulation, can not establish a lawful basis for the refusal of the commission to ascertain rightly certain facts, when that action is ordered by Congress. If the commission is justified in refusing to estimate the cost of acquisition of these lands, because it is possible to indulge in unreasonable conjecture and to form erroneous judgments, it may with equal justification refuse to make any estimates, since all estimates involve the use of judgment in the making of the necessary basic assumptions.

The commission is now engaged in making an estimate of the present cost of reproduction of all of the railroads in the United States, it being assumed that all of these roads would be reproduced between the years 1914 and 1920. When the work is completed it will purport to show for all of the railroads in the country the cost of reproduction during that period of their property. This estimate is necessarily based upon a foundation of assumptions. The assumptions employed by the commission and the methods of cost ascertainment are explained in the opinion in the Texas Midland case (pp. 11 et seq., 108 et seq). But it is not possible for the human mind to grasp the status of the conditions affecting the costs of construction, the price of materials, land values, and the wages of labor which would exist in this country during those years were all of the railroads of the country to be obliterated during that period and then reconstructed. The business life of the Nation would be disorganized. The increase in the demand for materials and labor would place their cost on so high a plane as to make the reconstruction of these properties a financial impossibility, even were their reconstruction a physical possibility (and it is not a physical possibility). The reproduction hypothesis, therefore, if applied to a theoretical and logical finality, brings the estimator to problems which are beyond rational determination. This difficulty is avoided by the use of common sense, by approaching the problem in a spirit of scientific inquiry, and by the use of that judgment necessary to make the results of the work of practical weight. The determination of the cost of acquisition of railroad lands is susceptible of a like solution.

Point 5. The present cost of condemnation and damages or of purchase of railroad lands can be readily and accurately ascertained in accordance with established legal precedents.

The problem of the ascertainment of the present cost of acquisition of railroad lands is merely the application of the principles which have become well established by legal precedents governing the rights of the parties in cases involving the acquisition of such property. As stated in an earlier portion of the brief, what Congress has required is an estimate of the cost of obtaining property the title of which is already held. Assumptions must therefore be made, and the judgment of the commission must be formed based upon these assumptions, and with a careful statement of them in order that the report will disclose the exact nature of the fact reported. A brief consideration of the

nature of the problem and the legal precedents which are applicable to it leads to a conclusion that an estimate of the cost of acquisition of railroad lands can be made with accuracy, with the use of reasonable assumptions which in no way impair the accuracy of the results, and that the law can thus be complied with.

We have heretofore suggested that the cost of securing railroad lands can be resolved into two general elements. The first of these is the acreage value of the area which is actually taken for railroad purposes. The second is the element of damage to the adjoining lands which the railroad does not take. The former is merely ascertainment of the value of the area of which the owner is deprived. The latter is an ascertainment of the diminishment in value of the lands of which the owner retains title and possession. The issue in each instance is an issue of value, the former being the value of the land taken, the latter being the decrease in value of the land not taken. Both of these determinations are of matters which lie in sound judgment based upon a consideration of the facts. Both of these problems are commonly presented to juries in cases which are common in every court of the land. These determinations are made pursuant to the established precedents which protect the owner of property against the taking or the damaging of any part of it. The damages, as the cases heretofore cited disclose, consist usually of those injuries due to the division or separation of the owner's land, and the severance of its parts by virtue of the alienation of title to particular strips desired for the right of way, and, in addition, of those injuries arising from the use of the lands taken for railroad operation, and of such character as the annoyance and inconvenience caused by noise and smoke and the hazards which arise from the possibility of injury to property by fire and to person by accident. This law is clearly defined and well established.

The following authorities are in point: Lewis, Eminent Domain (third edition) Chapter XX; United States v. Grizzard (219 U. S. 180, 183–184); Lincoln v. Commonwealth (164 Mass., 368; 41 N. E. Rep., 489); R. I. & E. Ry. v. Gordon (184 Ill., 456; 56 N. E., 810).

Clearly it can not be said that any insuperable difficulty is presented by the ascertainment of these items of value and damages as to property which is not yet acquired or which is in the course of acquisition, since that problem is one which is commonly solved by juries in condemnation cases. If there is any proper basis for the refusal of the commission to make the ascertainment which is thus commonly made by courts and juries, the refusal must proceed from the fact that there is a difference between the problem presented by the ordinary condemnation case and that which arises in the determination of the cost of property which is already acquired. The reason must be that the difference in the conditions existing in the problem which confronts the jury and the problem which confronts the commission as to property now owned by the railroad presents an insuperable obstruction.

The refusal of the commission to comply with the act, is, as has been said, entire. It declines to report the cost of acquisition of railroad lands in any case. It is clear that in cases where the property has in fact been acquired recently and the lapse of time has produced no conditions making the problem presented by the act different from that which is presented to the juries, nothing prevents the commission from forming the same judgment which a jury would form. Thus where the actual acquisition of the property has been so recent that the conditions obtaining at the time of purchase were substantially those at the valuation date assumed by the commission in making its report, the "present cost of condemnation and damages or of purchase" would be substantially the same as that original cost. Therefore the findings required by the valuation act can be made without any assumptions other than that the carrier has not title. The judgment in such an instance does not differ from the judgment which a jury would make without hesitation.

The commission, however, declines under such circumstances to ascertain the present cost of acquisition. It is alleged in the amended petition, and it is not denied in the commission's answer, that certain lands were acquired by the plaintiff for right of way purposes shortly before the valuation date, by the means of eminent domain and at an actual cost of $180,000, and that the commission has reported the so-called "present value" of these lands at $60,000 (Rec. pp. 34, 35). This "present value," as above explained, is merely the acreage value of the area taken, upon the basis of the acreage value of the adjoining property, and with no consideration of the damages to the adjoining property represented by a difference between this partial cost and the total

price required by the law to be paid. It can not be seriously urged that the commission in such a case can not comply with the act, or that the present value of such lands can justifiably be reported by the commission as less than would be determined by a jury in such condemnation proceedings, in accordance with the principles of eminent domain which are firmly established as a part of the law of the land. The commission, by reporting as the "present value" of such property a mere fraction of the cost of securing it, covering only part of the elements of value which attach to the property and for which the carrier under established law was required to pay, by refusing to comply with the terms of the act which require the reporting of these complete costs and of all elements of value of the lands, has proceeded in clear disregard of the terms of the act and of the basic law governing the cost and value of such property.

The injustice of this position, and the injustice of reporting such misleading information, is manifest when it is recognized that the attitude of the commission results in its reporting as the "present value" of lands which the carrier has just acquired a sum which is one-third of the amount which the carrier was required to pay under the laws of eminent domain as the cost of acquisition of the property, which cost Congress has ordered to be reported and which cost the commission can report, since it is certainly capable of forming the same judgment which in fact the juries in the recent condemnation proceedings have just formed.

The foregoing considerations point conclusively to the fact that the ascertainment legally can be made, where the property has been recently acquired. Does a lapse of time between the date of its original acquisition and valuation date make impossible the legal ascertainment of its present cost of acquisition and damages or of purchase? Here again it is clear that the problem which the commission declines to investigate is commonly investigated and solved by the courts and juries. The commission refuses to comply with the act because of the supposed chaotic condition of facts attendant upon the assumption of the obliteration of the railroad and the annihilation of the community development which has arisen because of the existence in the community of the railroad facility. But the making of this estimate of the cost of acquisition of lands which are now held and are now used for railroad purposes does not necessitate any such impractical process. If the problem were presented to a jury, the court would be impressed by no such difficulty in instructing the jury as to how it should proceed.

The court would not in reliance upon the Minnesota rate cases come to the commission's conclusion that because of the impossibility of indulging in these speculative hypotheses said to be referable to no criterion or standard of reason the farmer would be restricted to the mere market value of the area taken, determined upon the basis of the acreage value of the adjoining farm, and with no consideration nor regard for the elements of value and the items of damage in excess of this meager amount. This exact problem is commonly presented to juries under instructions embodying the established principles of law, and decided by such juries, and no such theoretical or hypercritical objections are or can be directed to the procedure. In such cases the amount which the landowner recovers is not and lawfully can not be limited to the mere acreage value of the area taken, and the cost of acquisition which the railroads are paying is not lawfully confined to the partial cost which the commission now reports and beyond which it finds it lawfully impossible to go. Such cases are of numerous varieties and are common in every court in the land. They are presented in the instance of railroads which have completed their construction upon the railroad lands in question and which are now under operation in such circumstances as these: It frequently occurs that the title to the land employed for right of way purposes is not secured in advance of the actual occupation of the property and the construction of the line thereon. The lands are occupied by mere license or under adverse possession, and thereafter it is necessary to obtain the legal title in condemnation proceedings brought for that purpose.

In other cases, a right is secured by leasehold or by license and the necessity subsequently arises after occupation and operation for the carrier to convert its leasehold or license into a fee. In other cases, a title is secured merely from a life tenant and it is necessary to condemn the rights of the remainderman. In other cases, where a title has been secured by the carrier from an owner, the holder of an outstanding mortgage forecloses the owner's title, and the carrier therefore must bring condemnation proceedings to perfect its title.

Cases of the failure of title for any one of a great variety of possible defects and in which the carrier must again secure title by condemnation proceedings, are common in every State. In these cases the courts have not found themselves confronted with an insuperable problem, which prevents the owner of the land which is sought to be condemned, from securing the full protection of his legal rights and just compensation for the deprivation of his property and of every element of its value. The present cost of acquisition which Congress has ordered to be reported, is accurately and justly determined in accordance with the law. The law in such cases is merely an application of the general principles of the law of eminent domain to the problem at hand.

In this regard, attention is directed to the following authorities: 15 Cyc. 722–723; Lewis, Eminent Domain (third edition) 705, and the cases cited; Sutherland on Damages, paragraph 1083; Faulk *v.* Missouri River & N. W. Ry. Co. (132 N. W. 233 (S. D.); County of Blue Earth *v.* St. P. & S. C. R. R. Co. (28 Minn., 503)

The cases heretofore cited indicate that the elements of the cost of acquisition are of two general classes, the acreage value of the land taken, and the damages due to severance and operation to the remainder of the owner's property. The commission has reported the first element in its report of the so-called "value." The carrier does not dispute the accuracy or reasonableness of the sums reported. This partial determination is one of the elements upon which a jury under such circumstances would be required to make a determination. The carrier now insists that the process shall be completed. The act so requires. As we have heretofore indicated, the position of the commission, in that it bases its refusal upon an interpretation of the Minnesota Rate cases, is clearly erroneous in that it involves a misconception of the doctrine of those cases and the proper scope of judicial precedent. In fact, the court in the Minnesota Rate cases manifestly implied after its criticism of the erroneous legal assumptions upon which the testimony was based, that had there appeared the costs of condemnation determined in accordance with established legal principles those facts would have been worthy of consideration. It is not to be assumed, as the commission does assume, that the determination of value or cost of the property, is to be conducted on a basis apart from the established principles governing the determination of the value of the identical property where the right of eminent domain is exercised. The following language from the Minnesota Rate cases is significant (230 U. S., 451):

"It is urged that in this view the company would be bound to pay the 'railway value' of the property. But, supposing the railroad to be obliterated and the lands to be held by others, the owner of each parcel would be entitled to receive on its condemnation its *fair market value* for all its available uses and purposes. (United States *v.* Chandler-Dunbar Water Power Co., decided May 26, 1913.) If, in the case of any such owner, his property had a peculiar value or special adaptation for railroad purposes, that would be an element to be considered. (Boon Co. *v.* Patterson, 98, U. S., 403; Shoemaker *v.* United States, 147 U. S., 282; United States *v.* Chandler-Dunbar Co., supra.) *But still the inquiry would be as to the fair market value of the property, as to what the owner had lost, and not what the taker had gained.* (Boston Chamber of Commerce *v.* Boston, 217 U. S., 189, 195.) The owner would not be entitled to demand payment of the amount which the property might be deemed worth to the company; or of an enhanced value by virtue of the purpose for which it was taken; or of an increase over its fair market value by reason of any added value supposed to result from its combination with tracts acquired from others so as to make it a part of a continuous railroad right of way held in one ownership. (United States *v.* Chandler-Dunbar Co., supra; Boston Chamber of Commerce *v.* Boston, supra.) *There is no evidence before us from which the amount which would properly be allowable in such condemnation proceedings can be ascertained.*" [Italics ours.]

In the pending case, however, the commission plants itself squarely upon the proposition that the testimony which would be properly received by a court in a case involving the identical problem, which is before the commission, would not be competent evidence of value. The amended petition of the carrier alleges (Rec., p. 35):

"Whatever may have been the difficulties inhering in or incident to the manner of proof offered in said Texas Midland case, the relator says that no such difficulty exists with respect to the ascertainment of said present cost of condemnation and damages or of purchase in the relator's case, and that

relator is prepared and has offered to establish definite competent proof respecting each parcel of land owned or used by it in the following manner, to wit:

"Relator accepts, as a basis for such ascertainment, the present market value of its lands, as found and determined by the respondent, and assumes that each parcel of land having reverted to adjoining owners as it would at common law upon its abandonment, would be reacquired by the relator by purchase or condemnation during the theoretical reconstruction period. Relator will prove such cost of purchase or condemnation by the testimony of competent expert witnesses familiar with each parcel of property, having knowledge of its value, and thoroughly experienced in the acquisition of private property for public use by purchase or condemnation.

"Where an entire parcel is thus acquired, the cost of its acquisition will be its market value as determined by the respondent as aforesaid plus certain incidental costs, such as court costs and the like; where a part only of an entire parcel is taken the cost of acquisition will be the market value of the part taken, as determined by the respondent as aforesaid, plus the damage to the residue of the tract, the market value of which would also be as determined by the respondent plus the incidental costs as aforesaid."

The commission in its answer (Rec., p. 26), denies that the evidence thus tendered is competent proof of the present cost of condemnation and damages or of purchase. We submit that this position is conclusively wrong.

Respectfully submitted.

W. G. BRANTLEY,
SANFORD ROBINSON,
LESLIE CRAVEN.

DECEMBER 8, 1919.

NATIONAL ASSOCIATION OF RAILWAY AND UTILITIES COMMISSIONERS,
Washington, D. C., May 27, 1921.

Hon. A. B. CUMMINS,
Chairman Committee on Interstate Commerce,
United States Senate, Washington, D. C.

DEAR SIR: Representing the National Association of Railway and Utilities Commissioners, we call attention to the attached resolution passed unanimously at the last annual convention of the association, commending the bill introduced by you to amend the valuation act to relieve the Interstate Commerce Commission from reporting, in its valuation of railroad properties, the estimated "present cost of condemnation and damages in excess of present value," being the same bill which you have introduced this session as S. 539.

We wish through you to urge the committee having the bill in charge to take early action upon the same. Unless Congress is ready to pass the bill at this time we do not see any reason to expect that it ever will be passed.

THE ISSUE INVOLVED.

The issue involved is exceedingly simple. It is whether there ought to be in the valuation act a provision which shall require the commission to consider, in fixing the values of railroads, not only what their lands cost and the present value of those lands but an estimate of the cost of a purely hypothetical present condemnation "in excess of present value."

THE COURT HAS PASSED UPON THE ISSUE.

In the Minnesota rate cases opinion (230 U. S., 352), the court passed directly on this question in words too plain to be obscured by any argument, however ingenious or sophistical. The court said:

"The company would certainly have no ground of complaint if it were allowed a value for these lands equal to the fair average market value of similar land in the vicinity, without additions by the use of multipliers or otherwise to cover hypothetical outlays. The allowances made below for a conjectural cost of acquisition and consequential damages must be disapproved."

Is the estimate which the commission is now required to make of the "present cost of condemnation and damages in excess of present value" an actual outlay or is it a "hypothetical outlay"? Unless there can be doubt about the answer there can be no doubt but that the question involved was passed upon in that case.

THE KANSAS CITY SOUTHERN CASE.

In the Kansas City Southern mandamus case (252 U. S., 178) the United States Supreme Court in nowise modified what it said in the Minnesota Rate cases, but recognized the force of a command of Congress addressed to the commission, saying that "Congress indisputably had the authority to impose upon the commission the duty in question," and that the commission was not at liberty to use its judgment by "exerting the general power which the act of Congress gave, and at the same time disregarding the essential conditions imposed by Congress upon its exercise."

The sole question is whether Congress will insist upon its mandate, which under this opinion now compels the judgment of the commission.

THE CARRIERS' BRIEF.

The carriers, through Judge Moore, have filed a brief, which, however misleading it may be in some respects, is nevertheless helpful in that it makes entirely clear to Congress what the carriers intend to accomplish by inducing Congress, if they can, to keep the present provision in the valuation act.

At the bottom of page 7 of that brief the following statement of the carriers' claim is made:

"The real present value of a railroad right of way is what its acquisition would cost, by purchase or condemnation, or what a similar right of way of equal convenience and usefulness would cost to acquire in a similar manner."

Whatever may be the "real present value," the commission will be required to find and report that by the requirements of the act, as it will stand after this bill is passed, for it will then require a report of "the original cost of all lands and the present value of the same."

The purpose of the carriers, however, is to get more than either the present value or the original cost. This is made entirely clear by this brief, if it is carefully read. We wish to comment on it very briefly.

The brief at first labors to create the impression that unless the carriers can have included in the value of their properties the estimate of "present cost of condemnation and damages in excess of present value," they will be denied the necessary cost of their lands, whenever the present value as appraised by the commission's land appraisers and reported is less than the original cost.

On page 8 of the brief Judge Moore calls attention to certain tracts of land, selected from among those which make up the Kansas City Southern right of way, which he states costs to condemn $180,000, but the present value of which has been appraised at $60,000. He then says at page 9: "Why should that company be limited to a 6 per cent return upon $60,000 with respect to property for which it paid $18,000?"

Again, on page 29 he refers to "the shocking injustice of ignoring the actual cost of lands to their owners and valuing them at their so-called present value," and goes on to say: "The commission, in point of fact, has entirely ignored the cost of lands when in excess of so-called present value." It is astonishing that Judge Moore should make this statement in the face of his actual experience in the valuation of the Kansas City Southern properties. He knows, and in another portion of his brief (p. 11) correctly states, the valuation procedure. We quote it as follows:

"The valuation act divides the activities of the commission in valuing railroad properties into two steps or stages. The first is the collection of the evidence in the case. This consists for each carrier of a statement of its original cost to date, an estimate of its cost of reproduction now, an estimate of its cost of reproduction less depreciation, its other values and elements of value, a statement of the original cost of land, an estimate of the present value, an estimate of the present cost of acquisition of lands, and certain miscellaneous data concerning revenues, stock issues, etc. This is a matter of accountants, engineers, land appraisers, and others, whose work is performed under the immediate direction of the Bureau of Valuation. When this has all been done, and the data have all been assembled and laid before the commission, the evidence in the case is complete.

"The commission is then ready to proceed to the second stage or step in the proceeding, which is to render its judgment upon the evidence, which is to consist of a statement of the final single figure or value to be assigned to each carrier. All of the evidence is to be examined and weighed and considered in the light of judicial precedent."

When Judge Moore in the Kansas City Southern case was arguing this very point before the commission, the following statement was made to him from the bench:

"This (land report) is not a final valuation. * * * So that when the commission comes to deal with the value of your entire property they will have all that you honestly and truly spent, and they will have all the other data upon that to judge of the value of your entire property. * * * It don't follow that because in reproduction cost you find 3, and you find the original cost was honestly and prudently 10, the rate base would not include 10 instead of 3."

That due consideration is given to actual cost of lands, if more than appraised present value, is shown by actual final valuations made by the commission. A convincing example is the valuation of the Fort Smith & Van Buren, a fragment of the Kansas City Southern system, where the costs and reproduction property estimates were as follows:

Cost of reproduction new of carrier property, other than land	$22,401	
Present value of carrier lands	7,870	
		$30,271
Cost of reproduction new of carrier property, other than land	22,401	
Original cost of carrier lands	25,389	
		47,790
Cost of reproduction new, less depreciation of carrier property, other than lands	17,780	
Present value of carrier lands	7,870	
		25,650
Cost of reproduction less depreciation of carrier property	17,780	
Original cost of lands	25,389	
		43,169

The final value found by the commission is $47,000.

Other examples might be given, but this demonstrates the principle, which is what we aim at here.

RESULT OF ADOPTING CARRIERS' PLAN.

The way the method of land valuation, which the carriers seek to compel the commission to adopt, would work out is very well illustrated by the Kansas City Southern valuation. They claim, as already pointed out, that they are entitled to have included as the present value of their lands what their "acquisition would cost by purchase or condemnation." In other words, they claim the present value of their lands, based upon the present market value of similar adjoining lands, plus the excess above that value which it is estimated it would now be necessary to pay to acquire them upon a present condemnation or purchase. What would this give to the Kansas City Southern?

The land figures in the Kansas City Southern case are set out below. The fourth column is the total of the actual present value, plus the hypothetical "present cost of condemnation and damages in excess of present value," and represents what the carrier seeks to obtain.

	Original cost.	Present value.	Excess above present value.	Present value plus excess.
Kansas City Southern Ry.	$2,232,549	$2,609,155	$2,735,490	$5,344,645
Texarkana & Fort Smith:				
Arkansas and Texas	128,828			
Arkansas		117,961	161,017	278,978
Texas		645,980	579,315	1,225,295
Kansas City, Shreveport & Gulf	241,203	522,746	539,933	1,062,679
Kansas City, Shreveport & Gulf Terminal	16,795	34,851	26,266	61,117
Maywood & Sugar Creek	6,550	8,729	9,768	18,497
Fort Smith & Van Buren	25,388	7,870	11,570	19,440
Poteau Valley	983	828	1,686	2,514
Arkansas Western	3,573	10,720	17,360	28,080
Port Arthur Canal & Dock Co.	52,842	278,695	271,989	550,684
Port Arthur Canal & Dock Co. (leased)		258,750	8,172	266,922
	2,701,711	4,496,283	4,362,566	8,858,851

The Kansas City Southern is not satisfied with an allowance of $4,496,285 for lands which represent a cost of $2,701,711. This is what Judge Moore, at page 32 of his brief, calls "confiscation on a vast scale." It demands that the commission shall allow for these lands $8,858,851. At one point in Judge Moore's brief (p. 16) the following statement is made:

"The position of the carriers, broadly speaking, is that when the commission has collected all the evidence in the case, material and relevant to the issue of the final value to be assigned to a particular carrier, the counsel for that company is entitled to urge upon the commission * * * that the value of the lands of his company should be measured by their cost of acquisition on valuation date. * * * Other counsel may, and doubtless will, make contrary contentions. It is for the commission to decide between them. The commission will, of course, give to each and every piece of evidence the consideration and weight to which in its opinion it is entitled under the law."

The real purpose of carriers, however, is not to obtain the judgment of the commission as to the worth of this estimated hypothetical present cost of condemnation. At another point in the brief (p. 32) the following statement appears:

"The commission, in its reports in all the valuation cases decided by it, has professed to give 'consideration' to the present cost of acquisition of carrier lands, but in point of fact has not included such cost of acquisition, or any part thereof, in its land values or in its findings of ultimate value."

In the case of all final valuations the carriers have protested the values fixed by the commission upon the ground (among others) that under the law the "present cost of condemnation and damages in excess of present value" must be added into reproduction cost.

It is therefore demonstrated by the carriers' acts and statements that they are not seeking to procure the decision of the commission according to its judgment upon this question, but are seeking to use the provision in the valuation act, which this bill would remove, to force the commission against its judgment to include this hypothetical estimate in the values found.

The argument which carriers will make in their contests in court, under the protests which they have filed, is known, because it has already been made before the commission. We quote from Judge Moore's argument in the Kansas City Southern case, as follows:

"I think it (the present cost of condemnation and damages) must necessarily be a criterion, because Congress has designated it as one of the criteria, for Congress has said in this act that that data must be assembled."

THE AMERICAN FARM BUREAU STATEMENT.

We feel that the statement made by Mr. Silver for the American Farm Bureau Federation before the House Committee on Interstate and Foreign Commerce, at a hearing on this bill, was entirely accurate. We quote the same:

"If the law stands as it now is, and the commission by reason of the requirement imposed by Congress is compelled to make this estimate of hypothetical cost 'in excess of present value' whatever increase in railroad value results will be a pure gift made to the railroads by congressional mandate. Congress can provide the gift, but it will remain for the public to make it good by paying the returns which the transportation act requires upon the added value. The farmers of the country will be called upon to do their share, and it will be a large one, for they can not pass on to the purchasers of their products the burden of the freight that must be paid upon them. They are willing to pay their share of a fair return of the real value of the railroads, but not upon values which are created or increased by fiat of law.

"The provision in the valuation act which this bill would repeal can have no other possible effect than to create values which would not otherwise exist. If those values are created, we know they will be created largely at our cost. For this reason we earnestly and emphatically protest against the provision, and declare that if the railroads are valued on such a basis, we never can regard rates made to give returns upon value so fixed as anything else than unjust impositions."

CONCLUSION.

The State commissions, since the valuation law was passed, have endeavored to secure a just and fair valuation of railroad properties. They commend the position taken by the Interstate Commerce Commission in supporting this bill,

which aims to prevent the inclusion of purely fictitious elements, and earnestly urge the early report and passage of the bill.

Respectfully submitted.

CHARLES WEBSTER,
Chairman, Committee on State and Federal Legislation.
JOHN E. BENTON,
General Solicitor.

STATEMENT FILED BY GRAY SILVER, WASHINGTON REPRESENTATIVE AMERICAN FARM BUREAU FEDERATION.

I wish to present the position of the American Farm Bureau Federation in regard to the bill now before you and to call to your attention, and request that they be placed in the record, the statements presented by Attorney Clifford Thorne, general council for the federation, and me before this committee in hearings on House bill 13997 on February 2, 1921.

On December 8, 1920, at our annual meeting in Indianapolis, the following resolution was passed, and we now have the same attitude toward the question under consideration as we had then.

"We insist that in fixing the value of property of transportation systems the commercial value of such property should be at least some indication of its real value, and we protest the action of the Interstate Commerce Commission in fixing the value of such properties at $50,000,000,000 in excess of their commercial value as an unjust imposition on the American people."

The farmers are particularly interested in this bill because of the effect upon transportation rates which the valuation act requiring the commission to consider, in fixing the values of railroads, not only what their lands cost, and the present valuation of those lands, but an estimate of the cost of a purely hypothetical present condemnation "in excess of present value" will have in advancing rates.

It seems to us that the Government has been exceedingly liberal in the granting of land to the railroads and that it is uneconomic at present to grant, in addition to a reasonable unearned increment represented by the present valuation of the land, a valuation in excess of their present value—a multiple valuation based upon a purely arbitrary or hypothetical valuation. That the Government has been liberal no one will question, when they consider the fact that up to 1910 the total land granted to railroads by the Federal Government alone was practically equivalent to the land area of Pennsylvania, Ohio, Indiana, and Illinois combined. Only a small part of this land, of course, was utilized as right of way or as terminal facilities, but it was a gift nevertheless. In many instances land was purchased and the right of way cost more than the adjoining land, but that is taken care of many times over in the great amount of land given to the railroads and the present valuation of the properties.

The farmer's position in regard to the railways is unique. Most of his product is hauled over them and for practically everything he buys he pays the freight. His product is not sold f. o. b. factory, but at a price delivered. This means he pays the freight. Right now his products are bringing 27.8 per cent below the 10-year average and he pays a freight charge 104 per cent greater than on June 1, 1918. And we must not forget that these additional freight charges come out of the products which he sells at 27.8 per cent below the 10-year average. The result has been, as many of the committee must know, that in many places throughout the country where farms are located some distance from market the products have been left to rot. In many instances farm products have not sold at destination for enough to pay for the freight, and farmers actually have received bills for freight instead of returns on their labor.

Examples of these losses are almost too numerous to mention. In the far West much of the fruit rotted on the ground. Farmers labeled their product "Too cheap to steal. Help yourself." The produce shippers from the Pacific coast, the Gulf States, and the Southeast have suffered untold losses from high freight rates. In the W[illegible] bulky and heavy commodities have been left in the fields or storage houses. Thousands of tons of hay in the West can not be moved by rail, for the rates exceed its value if carried to market.

The valuation act as it now stands, we believe, will not relieve the situation, but will aggravate it, and, in short, that is why the farmers protest most earnestly against it and wish to see the bill under consideration passed. They

do not consider this bill a panacea for the present ills of transportation and agriculture, but they do not wish to see the situation become more complex.

The farmers are willing to pay their share, and it is a big one, on a fair valuation of railroad property, but not upon values which are created by fiat of law. We realize also that rates based upon such a basis would be unjust impositions.

We do not believe the Congress in passing the law had in mind the addition of a multiple valuation in addition to or in excess of the present value, which is purely a gift made to the railroads by congressional mandate. The question of replacing the right of way, as far as the land is concerned, is not involved in the valuation, for the right of ways are not to be reconstructed or laid out again. Most of them have been in existence for years, and therefore the reconstruction theory falls of its own weight.

There never was a time when the principle of a multiple or hypothetical valuation has been so thoroughly disproven as at present. Railroads are fast coming to realize that traffic can bear only a certain charge—that there is a dead line leading into the field of diminishing returns. Overcapitalization, such as this hypervaluation provides, means only one thing, that the producers—the shippers—must pay higher transportation rates. The farmers as well as the manufacturers and consumers can not stand the imposition of these higher rates, and we trust this committee will see that proper legislation is enacted to afford relief.

(Whereupon, at 11.55 o'clock a. m., the subcommittee adjourned to meet at the call of the chairman.)